



COLLEGE OF LAW AND GOVERNANCE STUDIES SCHOOL OF LAW  
GRADUATES PROGRAM

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**MASTER OF LAWS (LL.M) IN BUSINESS LAW**

**LEGAL AND INSTITUTIONAL REFORMS NEEDED FOR IMPLEMENTATION  
OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF  
FOREIGN ARBITRAL AWARDS IN ETHIOPIA**

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A Thesis Submitted in Partial Fulfillment of the Requirements for  
The Award of Master of Laws (LL.M) in Business Law at School  
Of Law, College of Law and Governance Studies, Addis Ababa  
University

**BY: Getinet Medina**

Addis Ababa, Ethiopia

July 2023

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**By: Getinet Medina Menegesha**

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July, 2023

## **Declaration**

I, the undersigned, announce that the thesis is my original dissertation, that it has not been submitted for a degree at any other university, and that all sources of materials used in the thesis have been properly cited.

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**“LEGAL AND INSTITUTIONAL REFORMS NEEDED FOR IMPLEMENTATION  
OF THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF  
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## Acronyms

<b>Abbreviation</b>	<b>Meaning</b>
AACCSA Commerce and	Arbitration Institute of the Addis Ababa Chamber of Sectorial Associations
ADR	Alternate Dispute Resolution
CC	Civil Code
Convention	New York Convention 1958
CPC	Civil Procedure Code
IAA	International Arbitration Act
ICA	International Court of Arbitration (ICC court of arbitration)
ICC	International Chamber of Commerce
LCIA	London Court of International Arbitration
ICSID	International Centre for Settlement of Investment Disputes
KAA	Koran Arbitration Act
KCAB	Korean Commercial Arbitration Board
NYC	New York Convention 1958
PCA	Permanent Court of Arbitration
SIAA	South Africa international Arbitration Act
UNCITRAL	United Nations Commission on International Trade Law

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## **Abstract**

*The field of international commercial arbitration has grown with remarkable speed in recent decades. It has increased dramatically as the most effective dispute settlement mechanism, and hence an important and vital tool for promoting international business and investment. Thus, conventions and treaties have been adopted, and specialized international institutions have been set up, in order to improve and facilitate the functioning of international arbitration.*

*Arbitration is preferable, than going to court because it has a faster conflict resolution procedure, is less expensive, and gives the parties complete freedom to have the case decided by the judges of their choosing and under the basic law or legal system of their choice. The New York Convention is now being ratified by nations in an effort to uphold arbitration award and streamline global trade.*

*Ethiopia opened a new chapter in its arbitration law when it enacted the Arbitration and Conciliation Working Procedure Proclamation Number 1237/2021. This proclamation is mainly inspired by the Model Law (1985). Ethiopia has also joined particularly the New York Convention, 1958 on the enforcement of foreign awards.*

*To assess the practice and challenges of Foreign Arbitral Awards in Ethiopia, both legal framework and the institutional practice of Arbitration centers were analyzed by the study. And also, this paper would try to elaborate the Legal and institutional Reforms conditions for implementation of the New York Convention on the recognition and enforcement of foreign Arbitral Awards in Ethiopia. As a result, this thesis would be investigated the position of foreign arbitral awards in terms of recognition and enforcement in Ethiopia.*





## CHAPTER ONE

### 1. Introduction

#### 1.1. Background

Disagreement is an inseparable component of humanity, and it leads to conflicts. Arbitration is now widely acknowledged as the primary means of resolving disputes in civil and commercial matters. Depending on the severity of the issues, they may be settled amicably without the intervention of an outside party, or they may require the intervention of an independent party.<sup>1</sup>

States want to recognize arbitral awards made in other countries in order to avoid further harassment of the plaintiffs (wins), as well as waste of time, money, and effort and to promote international investment and commerce. In order to ensure that adequate justice is served, national courts are obligated to ensure that any foreign arbitral award is devoid of significant flaws that could prevent it from being enforced in the state where recognition and enforcement is sought.<sup>2</sup>

When the award is not complied with voluntarily, the winning party needs to enforce it. Enforcement aims at ensuring that the award is executed: for example, if the losing party refuses to pay the sums that the arbitral tribunal has awarded, the award-creditor can obtain the money through a coercive enforcement procedure. In this case, the award must be recognised and enforced internationally. The regime of international circulation of awards is largely shaped by the 1958 New York Convention. The New York Convention obliges States party to the Convention to recognise and enforce foreign arbitral awards.<sup>3</sup>

The award debtor is thought to unconditionally comply with an arbitral award once it is issued, or to try to negotiate a discounted settlement over the arbitral award, or to refuse to comply with it at all once it is issued. However, the award creditor is left with little choice except to pursue legal action in the best court for recognition and execution of the foreign arbitral award.<sup>4</sup>

The NYC is one of the most successful international treaties on judicial cooperation in civil and commercial cases thanks to its large membership. It is based on the concepts of party

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<sup>1</sup> Saber Habibi S, International Commercial Arbitration : Legal Analysis with Special Reference to the Contemporary Issues under Indian Law,(2014),

<sup>2</sup> Tecele Hagos ,The Ratification of the New York Convention in Ethiopia: Towards Efficacy and Avoidance of Divergent Paths, Mizan Law Review Journal Vol 15 No. 2 ,December 2021

<sup>3</sup> George A. Bermann (ed), Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Volume 23

<sup>4</sup> Ibid.

autonomy and the effectiveness of arbitration agreements and awards. Ethiopia's ratification of the treaty is a significant step forward in the country's strategy to attract foreign investment in its territory.

The NYC on the Recognition and Enforcement of Foreign Arbitral Awards was adopted by a United Nations diplomatic convention on June 10, 1958, and went into effect on June 7, 1959. Courts of contracting nations are required by the Convention to give effect to private arbitration agreements and to recognize and enforce arbitration award made by other member states.<sup>5</sup>

Countries boost their competitiveness in international markets and increase FDI and commerce by lowering transaction risks and the cost of new infrastructure projects when their international arbitration systems are strengthened. International commercial arbitration systems can be improved by countries. Ethiopia signed various international treaties in order to entice foreign corporations to come and invest.<sup>6</sup>

Ethiopia became a member party to the convention in August 2020. It is domesticated by Proclamation No. 1184 of 13 February 2020, published on the Official Gazette dated 13 April 2020, Ethiopia became the 165<sup>nd</sup> State internationally and the 33<sup>rd</sup> among the African nations to ratify the 1958 NYC on the Recognition and Enforcement of Foreign Arbitral Awards.

This thesis, the main focus of the researcher will be to look into the Legal and institutional reforms needed for implementation of the convention on the recognition and enforcement of foreign Arbitral Awards in Ethiopia, and briefly analyse the problems, faced in the field of enforcement of foreign arbitral awards in Ethiopia and examine the present position with special regard to the Arbitration and Conciliation working procedural proclamation No 1237/2021.

## **1.2. Statement of Problem**

The quick recourse to arbitration award presents plenty of questions and issues about the rules that govern arbitration awards, as well as the laws that control how it is conducted. The function of the competent court, as well as the principles guiding the execution of foreign

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<sup>5</sup>[https://en.wikipedia.org/wiki/Convention\\_on\\_the\\_Recognition\\_and\\_Enforcement\\_of\\_Foreign\\_Arbitral\\_Awards](https://en.wikipedia.org/wiki/Convention_on_the_Recognition_and_Enforcement_of_Foreign_Arbitral_Awards)

<sup>6</sup> Le Nguyen Gia, The Recognition and Enforcement of Foreign Arbitral Awards in Vietnam, Osnabrück, (2019), <https://osnadocs.ub.uni-osnabrueck.de/handle/urn:nbn:de:gbv:700-202011193745?mode=full> last accessed on December 20, 2022

<sup>7</sup> [https://newyorkconvention1958.org/index.php?lvi=cmsspage&pageid=8&opac\\_view=-1&menu=715](https://newyorkconvention1958.org/index.php?lvi=cmsspage&pageid=8&opac_view=-1&menu=715) accessed on February 20, 2023.

arbitration awards in Ethiopia, need to be elaborated and will be critically examined. An in-depth look will be made towards gaps in laws and practice that may lead to negative opinions of the country's arbitration award system.

Ethiopia's ratification of the NYC is a significant step forward in the country's continuous efforts to attract more foreign investment. The implementation of a consistent framework for the recognition and enforcement of arbitral awards will undoubtedly contribute to the country's improved reputation as a business-friendly jurisdiction.

The research examines the existing legal and factual situations in relation to Recognition and Enforcement of Foreign Arbitral Awards in Ethiopia and attempts to indicate what ought to be done, It also attempts to make some inferences as to what the future of Foreign Arbitral Awards would be based on the existing factual and legal situation in Ethiopia. And thereby assesses the strength and weaknesses of the arbitration system and practical issues of the law. If an arbitral award had no effective enforcement mechanism, the value of international commercial arbitration would be significantly diminished.

### **1.3. Objectives of the study**

The objectives of the research could be classified in to two categories namely, general objectives and specific objectives

### **1.4. The General objectives of the research**

The study's main goal is to compare and contrast the NYC with the Ethiopian Arbitration and Conciliation Working Procedure Proclamation, examine whether or not there are sufficient legal and institutional setup for the development of foreign Arbitral Awards in Ethiopia and court structures and to suggest alternative ways for improvements.

### **1.5. Specific objectives**

The research's precise objectives can be stated as follows:

- Analysing the legal and institutional adaptations needed to effectively recognize and enforce foreign arbitration awards within the new legal framework award statutes.
- Examining the experience of selected countries in adapting their internal laws and procedures to implement the NYC.
- To investigate several aspects of judicial intervention in arbitral proceedings.
- To forward recommendations to improve Ethiopian law and procedures for recognition and enforcement of foreign arbitral awards.

## **1.6. Research Questions**

In view of the study objectives, the research attempts to address the following specific questions;

1. What are the foreign arbitral awards procedural problems of the Ethiopia Arbitration and Conciliation proclamation of 1237/2021?
2. What are the grounds in which Courts can intervene on the foreign arbitral awards?
3. What type of actions and changes are needed to improve the Ethiopian law and procedure for recognition and enforcement of foreign arbitral awards?
4. What are the experiences and lessons to be drawn from other countries who have managed in adapting their internal laws and procedure to be in line with the NYC?

## **1.7. Methodology of the study**

This study was primarily a doctrinal investigation, with the goal of examining key legal provisions and judicial decisions on in the context of Foreign Arbitral Awards. To elucidate on some practical issues relating to the research, a non-doctrinal method were also be used. To achieve these goals, a qualitative data collection approach would be implemented. The study makes use of a combination of primary and secondary data sources.

Court cases, arbitration awards, laws, and interviews are as primary data sources. Key Informant Interviews with Arbitral Awards professionals and judges would be arranged to gather their opinions and experiences. The interviewees would be chosen using a purposive sampling strategy that considers their competence, position, knowledge, and experience in the field. To do so, a semi structured interviewing strategy would be used to conduct the interview because it allows the researcher to be consistent and flexible in asking questions in order to probe relevant data.

Literatures on the experiences of other countries in enforcing Foreign Arbitral Awards will be consulted. To these end, books, journal articles, and other research findings will be made use of to establish the conceptual framework and understanding of an effective enforcement mechanism of foreign arbitral awards.

## **1.8. Significance of the Study**

This research envisages assisting academicians, policy makers, negotiators and others by highlighting the major consideration to take into account in practicing this new area of law.

The study will help with in contributing towards the creation of an investor friendly regime. Moreover, by demonstrating the potential risk and gap, policymakers and negotiators/ arbitrators will be able to re-evaluate their actions. This study may provide information to legislators so that any gaps in the legal work frame will be filled. Last but not least, academics may be able to profit from the same area and add more to the understanding of the problem.

### **1.9. Scope of the Study**

The study's scope is limited to the recognition and enforcement foreign arbitral awards institutions. This research focuses on the recognition and enforcement of foreign arbitral awards in Ethiopia, as well as the numerous regimes that control this issue. The study will try to look in legal and court and arbitration aspects needed to satisfactorily implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. An attempt would be made in these regards.

### **1.10. Limitations of the study**

The limitations the study had since the Arbitration and Conciliation working procedural proclamation No 1237/2021 came into effect, there were only four records of the cases brought to the federal High court, so it was not possible to find records to see what the proclamation actually says, Due to work, I had to go outside Addis Ababa for a mobile trial, and it was difficult for me to go to important government offices and interview of who have more knowledge in the case, lawyers, judges and civil affairs prosecutors, due to the confidentiality nature of arbitration process and its award the study has faced difficulties in accessing some arbitration awards cases available in the Ministry of Justice Civil Affairs Administration or lawyers are not willing to give or show the foreign arbitration awards that have not been brought before the court, and the reason for their unwillingness to show them is that their client's case should be kept confidential. So, all cases are not available because arbitration awards are often confidential and the published awards are often summarized or heavily edited.

## CHAPTER TWO

### Institutions for the Implementation of the New York Convention

#### 2.1. Implementing Legislation

It is crucial to ascertain whether the NYC has been implemented by legislation in any particular jurisdiction. No such implementation is required for the Convention to apply in states where international treaties are regarded as self-executing. However, implementing legislation is likely required in jurisdictions that do not consider international treaties to be self-executing (or for some reason do not consider the NYC in particular to be self-executing).<sup>8</sup>

In certain cases, national courts will strictly speaking apply that implementing legislation rather than the text of the Convention. Only a small portion, albeit a sizable portion (almost one-third) of the jurisdictions examined specifically declare the NYC to be self-executing, making it automatically applicable without the need for implementing legislation.<sup>9</sup>

Although not considered self-executing, the Convention has been implemented in several countries by domestic legislation that either copies the text of the Convention directly or incorporates it by reference.<sup>10</sup>

For all intents and purposes, the text of the Convention itself is the domestically applicable law in both of these instances. However, the appropriate implementing legislation in some other countries deviates from the Convention in some ways.<sup>11</sup>

By establishing the UNCITRAL Model Law, which incorporates equivalent recognition and enforcement provisions, several nations believe they have sufficiently implemented the NYC statutorily.<sup>12</sup> Implementation in this specific way is in theory not problematic. However, in other instances, the national implementing law seems to materially depart from the NYC. It goes without saying that national arbitration laws may establish additional requirements for the application of the Convention, requirements that may need to be complied with in order for an award creditor to effectively invoke the Convention at the national level.

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<sup>8</sup> George A. Bermann (ed), Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Volume 23, page 7.

<sup>9</sup> Ibid

<sup>10</sup> See, for example, Korea Arbitration Act, chapter VII; The fact that a State enacts implementing legislation does not necessarily mean that the Convention is not itself self-executing.

<sup>11</sup> See, for example, the 1996 Arbitration Act of the United Kingdom, S. 100-04.

<sup>12</sup> See, for example, the national reports for Ireland (Arbitration Act 2010); Malaysia (Arbitration Act 2005, s 38-39); Norway (Arbitration Act, no. 25 (2004)); and Singapore (International Arbitration Act, act no. 23 (1994).

However, based on the national reports, it appears that signatory States have very infrequently proclaimed the Convention to be non-self-executing while also failing to pass suitable implementing legislation.<sup>13</sup> Furthermore, there is little evidence in the national reports that the Convention has been implemented through national legislation that aims to substantively modify its significance.<sup>14</sup>In the following section we shall see cardinal concepts worth to take note of while implementing NYC in domestic jurisdictions.

## **2.2. The Definition of an Arbitral Award?**

The NYC makes no attempt to define the word "arbitral award" in any meaningful way. The phrase "shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted." according to Article I (2). However, many scholars are said to have a very broad definition of the phrase. Smaller groupings either include a requirement that the dispute resolution be "final and binding" in the term or reiterate the specific rules of UNCITRAL Model Law, Article 31, on "Form and Contents of Award."<sup>15</sup> Although national law appears to be content with ambiguous or no definitions of "arbitral award," it is likely to address related questions of a more specific nature, such as whether the concept of award includes "partial awards" (i.e., awards that dispose in final and binding terms of some but not all the legal claims and issues in a case). A large number of national laws expressly indicate that partial awards are considered awards under the Convention.<sup>16</sup>

Even if the law is silent on the subject, the overwhelming majority opinion is to that effect. It's worth noting that the terms "partial award" and "interim award" are sometimes used interchangeably in national media. Because the term "interim" is most usually linked with provisional measures given by arbitrators, the latter phrasing is best avoided. While it appears that partial awards are considered awards, this may not be the case for interim arbitral measures.

Some decisions are confusing "Expert determination" is one such example. It's unclear what an expert determination entails, and in most jurisdictions, whether it's subject to challenge by an arbitral award or not.<sup>17</sup>It is a matter that needs to be clarified ideally not only at the national level, but at the level of the entire Convention. Apart from that, the lack of a more

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<sup>13</sup> George A. Bermann(ed), Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Volume 23,page 8.

<sup>14</sup> *Ibd*

<sup>15</sup> *Ibd.* page 12.

<sup>16</sup> Partial awards are expressly recognized as constituting awards under the Convention in Croatia (Law on Arbitration, art 30); Ireland (Arbitration Act 2010, art 2(1)); Malaysia (Arbitration Act 2005, s 2); Peru (Arbitration Law, art 54); and Portugal (Law no. 63/2011, art 42(2)).

<sup>17</sup> See the national report for Canada. The prevailing view at least in Switzerland is that expert determinations are not awards.

meaningful definition of "arbitral award" is not described as particularly problematic in the reports.

### **2.3. The Definition of a Foreign Arbitral Award?**

What qualities does an award need to exhibit in order to be declared "foreign" and hence subject to the Convention under a country's domestic law? Is it necessary for an award to be created abroad to qualify as "foreign," or does it suffice if it has some "foreign" feature? "This Convention shall apply to the recognition and enforcement of arbitral judgments made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," the Convention states in Article I(1). "It shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought," it continues. If States opt to view awards rendered within their own territory as "foreign," rather than abroad, the following clause suggests that they may classify those awards as "non-domestic."<sup>18</sup> As the words of the Convention suggest, the vast majority of States consider an award to be "foreign" within the meaning of the Convention only if it is made on the territory of a foreign country. Indeed, according to the reports, even if the parties agreed to conduct the arbitration in conformity with the arbitration legislation of the area where recognition or enforcement is sought, an award made outside will be regarded foreign in the enforcing State.<sup>19</sup> The Convention's recognition and enforcement obligation applies even when an award is based on an arbitration held in the United States, as long as the award "involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign States," according to the United States Federal Arbitration Act.<sup>31</sup>

A few national reports particularly raise the possibility that if an award is made expressly pursuant to another jurisdiction's law of arbitration, it may be recognized as a Convention award under the Convention.<sup>20</sup> In Mexico, for example, the lack of a definition of "foreign award" appears to be irrelevant, as all arbitral awards, domestic or international, are subject to the same recognition and enforcement regime, including the reasons for denial of recognition and enforcement.<sup>21</sup>

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<sup>18</sup> George A. Bermann(ed), Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Ius Comparatum – Global Studies in Comparative Law Volume 23, page 13.

<sup>19</sup> See, for example, The National Rreport for Switzerland

<sup>20</sup> See The national report for France, pointing out that this circumstance has not yet arisen in that country.

<sup>21</sup> George A. Bermann(ed), Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts, Studies in Comparative Law Volume 23, page 14.

## 2.4. Provisional or Interim Measures as Awards

One of the more difficult concerns of definition under the Convention is whether interim or provisional relief granted by an arbitral tribunal can be considered awards under the Convention and so presumptively recognized and enforced. Clearly, recognizing and enforcing arbitral provisional procedures improves their efficacy and, arguably, arbitration's efficacy.

The problem is that such measures must be considered not merely binding, but also final. There appears to be a lot of confusion about this problem among the reporting countries. According to reports, courts in a number of states including those where the issue has arisen have yet to reach a decision on the issue.<sup>22</sup> Even in the absence of case law, national reporters for a large number of nations express strong opinions on the subject, favouring or opposing the recognition of provisional measures as awards. Nonetheless, it appears that a clear majority of jurisdictions that have addressed the issue more often by judicial interpretation or academic consensus than by express statutory language refuse to treat provisional measures as awards, thereby excluding them from the Convention's guarantee of recognition and enforcement.<sup>23</sup>

The core premise is that interim remedies are just temporary and, because they are adjustable, they are incapable of resolving issues permanently.<sup>24</sup> Only a small number of states have determined that such measures are or may be recognized and enforced as Convention awards. It's worth noting, nevertheless, that practically all countries agree that temporary measures don't include things like procedural or scheduling orders issued by a tribunal.

The fact that temporary measures are not treated as awards in many jurisdictions does not necessarily indicate that they are unenforceable in those jurisdictions' courts, because such measures may be enforceable under local law without the need to be treated as Convention awards. To put it another way, characterizing an interim measure as an award isn't always the only way to enforce it. Even the UNCITRAL Model Law treats interim measures as judicially enforceable without naming them as awards; therefore courts in jurisdictions that adopt the Model Law are likely to give those measures effect under their *lex arbitri* rather than the Convention. In other words, while they do not treat provisional measures imposed by foreign tribunals as awards, they do specifically provide for recognition and enforcement of those measures in their legislation.

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<sup>22</sup> Ibid

<sup>23</sup> Ibid

<sup>24</sup> *Resort Condominiums v Bolwell* The Australian case of , (1993) p. 118,655

## 2.5. Meaning and Purposes of Recognition and Enforcement

In the majority of circumstances, the phrases "recognition" and "enforcement" are used interchangeably. However, within the framework of the enforcement process, they have distinct meanings and can be employed for different reasons. The phrases are mentioned jointly in articles IV and V of the NYC. The Model Law's Article 35 contains the same wording. In effect, the reason these phrases are commonly used in combination is that awards cannot be implemented unless the court that mandates their execution recognizes them, and so these terms cannot be separated.<sup>25</sup>

As a result, there is usually a separation made between the acknowledgment of a foreign decision and its enforcement. 'Recognition' implies accepting the court of origin's judgment of rights and responsibilities; 'enforcement' involves ensuring that the award-debtor follows the court of origin's ruling. Because enforcement of a foreign award would be irrational unless the court enforcing it accepted the court of origin's judgment of the parties' rights and obligations, enforcement must be preceded by recognition.<sup>26</sup>

However, the phrases can be used separately because an award can be acknowledged but not enforced, so they can be thought of as two stages of the parties' rights and obligations. This may be observed in Article III of the NYC, which refers to these terms as if they were distinct in terms of the criteria that can apply to each. Furthermore, the Model Law refers to the terms as if they are distinct yet related in Article 36. Because it is based on a special treaty rather than an arbitration agreement, the NYC has jurisdiction.

This means that the distinction between recognition and enforcement is that an award can be acknowledged but not enforced; but, if an award is enforced, it must be recognized by the court that orders its enforcement. As a result, an award-creditor in a foreign arbitral award may simply seek recognition or recognition and enforcement of the award.

The two main factors of an award and the final process in the arbitration procedure are recognition and enforcement. The party must submit the award to the court of jurisdiction where enforcement is sought after the tribunal has made its decision. The court is required to enforce the arbitral award within a certain amount of time after receiving it. There must be a relationship between the country seeking enforcement and the arbitration seat for the award to be enforced.

The NYC stipulates that awards must be legally binding or valid; otherwise, they are unenforceable. The law of the country in which or under the law of which the award was rendered must determine whether it is binding or valid.

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<sup>25</sup> Alan Redfern and Martin Hunter Law and Practice of International Commercial Arbitration, 3rd ed., (London: Sweet and Maxwell), 1999, p. 10-09.

<sup>26</sup> Ibid

## 2.6. The grounds for Refusal recognition and enforcement Arbitral Award under the NYC

The NYC specifies the numerous grounds for refusing to recognize and enforce an arbitration award. This is not only due to the Convention's relevance, but also, and perhaps more importantly, since the Model Law's provisions governing the recognition and enforcement of awards in Articles 17(I) (a), 35, and 36 are nearly identical to those found in the Convention. No review on the merits of an award to which the Convention applies is permitted under the NYC or the Model Law. Furthermore, the NYC and the Model Law provide detailed grounds for refusal of recognition and enforcement. They are the only grounds for refusing recognition and enforcement.<sup>27</sup>

Even if there are grounds for refusing to recognize and enforce an award, the enforcing court is not obligated to withhold enforcement. The first two sentences of Article V(1) and (2) of the Convention say that enforcement 'may' be rejected, not 'must' be refused. The language is optional rather than mandatory.<sup>28</sup> The same is true of the Model Law.

The NYC and the Model Law both aim for the reasons for refusing to recognize and enforce arbitral award to be applied as narrowly as possible. As one of the Convention's prominent commentators put it, insofar as the grounds for refusal of enforcement of the Award specified in Article V are concerned, they must be understood narrowly.<sup>29</sup>

## 2.7. The Experience of Selected Countries in Implementing New York Convention

### 2.7.1. Introduction

The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is cherished by the international arbitration community and is extremely well utilized. Given the significance of international arbitration in the settlement of international conflicts and its utter dependence on the mobility of verdicts, this comes as no surprise.

Currently, countries resolve trade disputes through arbitration instead of going to court, and have adopted the New York Convention in Practice. Accordingly, the members of the convention reached around 171. Likewise, Ethiopia has adopted the Arbitration and Conciliation law in 2021 and is a member country of the New York Convention.

In this paper, the main reason for the inclusion of other countries in the implementation of the New York Convention is that Ethiopia has only been working for two years after approving the New York Convention, and it is important to learn from other countries' experience in implementing arbitration awards given abroad and the challenges they face.

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<sup>27</sup> Alan Redfern and Martin Hunter, on Interantional Arbitration, Sixth edition.p.622.

<sup>28</sup> Van den Berg, The New York Arbitration Convention of 1958, 1981, p. 265.

<sup>29</sup> Van den Berg, The New York Arbitration Convention of 1958 ,1981. p. 267 and 268.

The New York Convention is an international convention that has been in place for more than 60 years since its ratification. Therefore, in the last 60 years, it is very beneficial for Ethiopia to take advice from the countries that have ratified the convention and are working on it.

Based on this, what is the status of enforcement of foreign arbitration awards in the court? whether or not they have established a special court, what is the benefit of appointing judges who have received special training and who have been executing for a long time? To enforce the awards from other court cases what does it look like for countries that are working on a different enforcement system?

Also, what is the advice given regarding the legal interpretation given by the Convention Courts when they apply it, especially the interpretation of the provisions of the reasons why arbitration given abroad cannot be carried out according to Article 5 of the Convention and what is the experience of countries in determining the reasons why an award cannot be carried out by their own laws, etc. It is because it is important to see what experience Ethiopia can take.

As a new member to this convention, Ethiopia among others has to formulate best experiences and lessons from other countries. The list can be long, however, for the purpose of this study, it is necessary to see the experience of three countries have the same/ related economic legal system as Ethiopia. And also considerations of Ethiopia's close relationship with the countries. Therefore, the researcher has chosen to look at the experience of Mauritius, South Africa and South Korea.

The reason for the selection of these three countries is that Mauritius follows two types of legal system, which is a follower of common law and civil law, and the country where Mauritius is currently working to become an African arbitration institution hub and has spent a lot of money on this issue, Since it has a codified system law that is similar to the Ethiopian law, Also, the fact that the arbitration law has been put into operation by issuing a more independent law and the decision of the arbitration is carried out by setting aside five judges selected by the Supreme Court to be able to execute the awards. This method is because it brings better performance and has good experience.

Another reason for choosing South Africa is that it is currently the country with the most arbitration institutions in Africa. As it has recently started working by amending the Arbitration Law. Recently started working on arbitration and reconciliation law and is a country that is willing to do better work, it can be experienced more than these two African countries.

Outside of Africa, the experience of South Korea is chosen because they are currently developing a system to become the arbitration of center in Asia. South Korea was chosen because they are currently developing a system to become the center of arbitration And at a certain point in time, the independent police have been issued and updated every five years Being a new starter, this is because Ethiopia is a country where it can gain more experience as it is a country that has recently enacted the Arbitration Law and ratified the New York Convention. The sum total of mixes of experiences of these countries can help draw a lessons for a new starter, to gain more insight and experience on how to approach the implementation.

Therefore, even though there are many countries that have more experience than other countries and have entered into work by approving the New York Convention for many years and have many years of experience, They are similar to Ethiopia and are countries that are working to become a better arbitration institution by starting work soon And they have been selected because they have more experience in terms of working to become a better African arbitration institution in the future, realizing that Ethiopia has a close relationship with these countries and they have recently launched an improved arbitration system.

The common ground for all this countries and Ethiopia in this subject matter happens to be the fact that the countries that are working to become a better arbitration institution/hubs.

### **2.7.2. The Experience of Mauritius**

Mauritius is one of the few countries with a dual legal system. The Mauritian legal system mixes civil and common law principles, which it has modified to its own needs to produce a unique corpus of Mauritian law. Because it combines common law and civil law, a lawyer who practices in both countries will be at least conversant with the legal system of the other. The various systems that control domestic and international arbitration are indicative of this. After signing the NYC on June 19, 1996, Mauritius ratified it on September 17, 1996. On June 2, 1969, the Washington Convention was also ratified on July 2, 1969, after it had been signed. For the recognition and execution of international arbitral awards, both Conventions contain provisions.<sup>30</sup>

The International Arbitration Act 2008, which was promulgated by the Parliament of Mauritius on November 25, 2008, and went into effect on January 1, 2009, was the country's first contemporary international arbitration law.

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<sup>30</sup> THE MAURITIAN INTERNATIONAL ARBITRATION ACT 2008 Text and Materials Updated 2016 Edition.

The Convention is currently implemented into Mauritius law by the International Arbitration Act 2008, which re-enacts the provisions of the International Arbitration (Miscellaneous Provisions) Act 2013, which initially gave effect to the Convention in Mauritius, with certain revisions. Which it has constructed. The IAA is based on the 2006 amendments to the UNCITRAL Model Law. The International Arbitration (Miscellaneous Provisions) Act 2013 was revised with effect from 1 June 2013 following an assessment of the IAA's performance in the years following its promulgation.

**Declarations and/or Reservations Attached to the Instrument of Ratification:** the enforcement of international arbitration awards rendered in Mauritius and those made elsewhere is subject to a uniform procedure. Because Mauritius is a party to the New York Convention without a reciprocity reservation, all international arbitral awards are enforceable in Mauritius and apply to arbitration proceedings simply because Mauritius is the arbitral tribunal's jurisdictional seat.<sup>31</sup>

**Procedural Issues** in Recognizing and Enforcing Foreign Awards, Requests under the Mauritian International Arbitration Act 2008 should be directed to the Secretary-General care of the PCA Mauritius Office. If a competent officer of the Supreme Court or any notary or attorney-at-law entitled to practice in Mauritius certifies a document, it is considered certified. There is now no charge payable to the PCA for the Secretary-assessment Generals of requests under the Mauritian International Arbitration Act 2008.

**Court Intervention:** - the Mauritian Courts will not intervene in the arbitral procedure except to support it and to guarantee that the International Arbitration Act basic protections are followed.<sup>32</sup> The International Arbitration Act 2008 gives arbitral proceedings a high level of autonomy. Courts in Mauritius are expected to consider the unique characteristics of international arbitration and refrain from interfering with the arbitral process.<sup>33</sup>In general, the Supreme Court can only interfere in arbitral processes to help them.<sup>34</sup>

**Provisional or Interim Measures relief ordered by arbitral tribunals as awards:-**Interim measures might be sought from arbitral tribunals or the Supreme Court until the enforcement of the judgement in Mauritius. The Designated Court's competence to issue interim measures is strictly restricted to the authorities set out in Articles 23(3) to 23(6) of the International Arbitration Act 2008, and it does not have any other powers that it could have under domestic law, such as inherent jurisdiction or other powers.

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<sup>31</sup> INTERNATIONAL ARBITRATION ACT 2008 Amended by the International Arbitration (Miscellaneous Provisions) Act 2013,Section 41

<sup>32</sup> The International Arbitration Act 2008,Art.2A

<sup>33</sup> The International Arbitration Act 2008,Art. 23

<sup>34</sup> The International Arbitration Act 2008,Art. 23(4)

**Length of enforcement proceedings:-**There is an expedited procedure in the local court that takes how long from the date of filing the application to the date when the first instance court renders its final order. Provisional enforcement orders served on a local respondent normally become final within 28 days. This normally happens within a few months of the application to set aside the provisional enforcement order being made.

**Appeal:-**All PCA rulings are final and cannot be appealed or contested in any way, so order to minimize satellite litigation and delays. A party who believes it has been wronged by a PCA decision cannot challenge it in national courts or in any other way; the only recourse is to challenge any subsequent award rendered by the arbitral tribunal on the basis that the PCA decision has given rise to one of the grounds of annulment set out In Art. 39 of the International Arbitration Act 2008 this is equivalent with article 34 of the Model Law.<sup>35</sup>

All court applications filed in Mauritius are heard by a specially constituted court the Designated Court, which consists of three judges selected by the Chief Justice out of six international arbitration specialist judges of the Supreme Court (designated judges).Appeal against any decision of the three designated judges of the Supreme Court can be made to the Judicial Committee of the Privy Council.<sup>36</sup>

### **2.7.3 The Experience of Republic of South Africa**

South Africa, like Mauritius, is a signatory to the NYC, and its International Arbitration Act 15 of 2017 codifies the UNCITRAL Model Law. The Arbitration Act 42 of 1965 Arbitration was adopted in South Africa fifty-two years ago to provide the statutory framework within which all arbitrations are conducted, and it applies to both domestic and international arbitration. Without reservation, South Africa signed the 1958 NYC on the Recognition and Enforcement of Foreign Arbitral Awards in 1976.<sup>37</sup>

The SIAA, No.15 of 2017, went into effect on December 20, 2017 and governs all international arbitrations held in South Africa, as well as the enforcement of foreign arbitral awards. In regard of international arbitrations, the SIAA 15 of 2017 completely replaces the out-of-date Arbitration Act No. 42 of 1965, as well as the Recognition and Enforcement of Foreign Arbitral Awards Act 1977.<sup>38</sup> International arbitration in South Africa is based on the UNCITRAL Model Law, subject to certain adaptations.

Article 7 of the SIAA 15 of 2017 defines the scope of this legislation, stating that any international commercial disputes that the parties have agreed to submit to arbitration under

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<sup>35</sup> Abdul Jinadu, Arbitrating in Mauritius

<sup>36</sup> The International Arbitration Act 2008 Art. 44

<sup>37</sup> Parliament of the Republic of South Africa Research Unit International Arbitration, June 13,2017.page 6.

<sup>38</sup> The International Arbitration Act, No.15 of 2017 (the Act) SCHEDULE 4,LAWS REPEALED OR AMENDED

the terms of an arbitration agreement may be decided by arbitration, provided that the dispute is arbitral. As a result, the scope of application is quite broad, and arbitrations can be viewed and construed as international arbitrations even if only one of the parties to the arbitration agreement is from a different country than the others. The UNCITRAL Model Law's Article 1 and, in particular, Article 1(3), provides a more detailed examination of the extent of application. The International Arbitration Act incorporates the UNCITRAL Model Law on International Commercial Arbitration 1985 on 21 June 1985, as amended 2006 into South African law.<sup>39</sup>

Subject to the rules of the SIAA 15 of 2017, the UNCITRAL Model Arbitration Law, as incorporated into Schedule 1 to the International Arbitration Act, applies in South Africa. This long-awaited event has resulted in a major increase in the number of international arbitrations held in South Africa, as well as the establishment of initiatives aimed at promoting the country as a regional arbitration hub.

The Arbitration Act and the Recognition and Enforcement of Foreign Arbitral Awards Act 1977 govern arbitration in South Africa. The latter aims to put into practice the 1958 NYC on the Recognition and Enforcement of Foreign Arbitral Awards. Each state has undertaken to enforce commercial arbitral judgements made in other contracting states by becoming a party to the NYC, subject to restricted grounds of refusal.<sup>40</sup>

South Africa's modernisation of arbitration legislation, practice, and process is promoting the growth of arbitration on a national and regional level, as well as in a broader international arbitration environment.<sup>41</sup>

**Declarations and/or Reservations Attached to the Instrument of Ratification:-**The fact that it has ratified the Convention without reservation. As a result, South Africa has signed the New York Convention without reservation.

**Length of enforcement proceedings:-**Unopposed enforcement proceedings generally take two to three months from the date of filing the application to the date when the first instance court makes its final order. Opposed proceedings take longer. The length of the delay in opposed proceedings depends on the division of the High Court in which enforcement proceedings are instituted. There is no expedited procedure unless the court is satisfied that there are compelling reasons for treating the application as urgent.

#### **2.7.4. The Experiences of Republic of South Korea**

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<sup>39</sup> The International Arbitration Act, No.15 of 2017, Art.6

<sup>40</sup> <https://www.nortonrosefulbright.com/en/knowledge/publications/029ea10c/overhauling-arbitration-in-south-africa>. last accessed on Apr.14,2022.

<sup>41</sup> The International Arbitration Act, 2017.

The Korean Arbitration Act requires direct quotation of the NYC, unlike many other nations where the Convention is incorporated into national arbitration laws.<sup>42</sup> The reason why the Convention was not merely paraphrased may be that, in Korea, a signed and ratified international treaty has as such the same legal force effect as any Korean statute, thus rendering unnecessary their codification. Scholars even suggest that codifying the provisions of the Convention might only cause unnecessary confusion.<sup>43</sup>

The principal legislation governing arbitration is the KAA, which was amended and enacted in 2016. The KAA applies to both domestic and international arbitrations seated in South Korea, while some of the provisions also apply to arbitration whose seat is outside Korea. Also, South Korea is a member state of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 NYC.<sup>44</sup>

The KAA is largely based on the UNCITRAL Model Law. Recent amendments entered into effect on 30 November 2016 to ensure that the KAA mirrors the language of the Model Law as amended in 2006. Regarding the form of arbitration agreement, the KAA adopted Option I of the UNICTRAL Model Law and requires the arbitration agreement be made in writing Article 8, KAA.

The new amendments to the KAA in 2016 provide two additional important changes from the previous version of the KAA that are unrelated to the Model Law:

Under the amended KAA, the court can be involved in a more focused way to assist the tribunal in taking evidence. Rather than limiting the court to either taking the evidence itself and sending records of it to the tribunal, or doing nothing while the tribunal takes the evidence on its own, the court can now provide assistance to the tribunal by ordering witnesses to appear before the tribunal or document holders to submit requested documents to the tribunal. This important new amendment allows the tribunal much greater control and direction over taking evidence.

The process of recognition and enforcement of arbitral awards under the amended KAA are carried out by issuing an order (rather than a judgment, which requires an oral hearing), encouraging more expeditious enforcement proceedings. The KAA still provides, however, that awards can only be set aside by a judgment. This distinction reflects the view that a court cannot easily set aside an award and it must carefully review the reasons before doing so.

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<sup>42</sup> Arbitration Law, Chapter VII, Recognition or Enforcement of Foreign Arbitral Awards, Article 39 (Arbitral Awards in a Foreign Country).

<sup>43</sup>[http://www.mofa.go.kr/incboard/faimsif/mltltl\\_popup.jsp?KOEN\\_ID=F592ACE19DEB024749256777001B3317&ITEM\\_PARENT\\_ID=C1A75D498876CC61492565ED001D9ACB](http://www.mofa.go.kr/incboard/faimsif/mltltl_popup.jsp?KOEN_ID=F592ACE19DEB024749256777001B3317&ITEM_PARENT_ID=C1A75D498876CC61492565ED001D9ACB). true last accessed on, June 17, 2022

<sup>44</sup>[https://uk.practicallaw.thomsonreuters.com/8-3812907?TransitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/8-3812907?TransitionType=Default&contextData=(sc.Default)&firstPage=true) last accessed on, June 17, 2022

**Declarations and/or Reservations Attached to the Instrument of Ratification:**-Korea made both reciprocity and commercial reservation when it signed the Convention<sup>45</sup>. While the reciprocity reserve is still relevant in theory for determining the Convention's applicability, it is now mostly worthless in practice. This is partly due to the fact that the number of Convention signatories has dwindled, and any issue of reciprocity has been increasingly debated.

**Third Parties:**-In principle, an arbitration agreement only binds the parties to it and the KAA does not allow an arbitral tribunal to assume jurisdiction over a third party who is not a party to an arbitration agreement. In practice, however, a third party can participate in an arbitration governed by the KAA with consent from all the parties to it. The 2016 KCAB International Rules also include a provision for conducting multi-party arbitrations (Article 21). There has been no court precedent dealing with the issue of piercing the corporate veil in an arbitration context.<sup>46</sup>

**Courts and arbitration:**-Courts can intervene in or assist with appointing arbitrators (when requested by a party), recognising and enforcing the interim measures rendered by an arbitral tribunal, and taking evidence on request from the arbitral tribunal (Articles 12, 18-7 and 28, KAA). Under the new amendments to the KAA, a court can be involved in a more focused way than before to assist the tribunal, allowing it much greater control and direction over taking evidence. The tribunal can make a request to the court either if a party asks it to or at its own discretion (Article 28, KAA).

**Arbitration institutions:**-Parties doing business in South Korea most commonly specify KCAB, the only national arbitration institution in South Korea, although many with an international component often specify the International Chamber of Commerce (ICC), Singapore International Arbitration Centre (SIAC), Hong Kong International Arbitration Centre (HKIAC) or London Court of International Arbitration (LCIA). The SIAC appears to be a popular choice for arbitration institution among users from Asia as Singapore has gained the reputation of being both an international hub and arbitration-friendly.

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<sup>45</sup> Young-Joon Mok, Sangsajungjaebeop, Bakyounsa (Bakyounsa 2011) at 283.

<sup>46</sup> Global Legal Group (GLG), the International Comparative Legal Guide to: International Arbitration 2009. Page 60.

## CHAPTER THREE

### Legal Reforms and/or Actions needed for Implementation of the New York Convention in Ethiopia

#### 3.1. The Law Governing International Arbitration in Ethiopia

Ethiopia has issued Ratification Proclamation Number 1184/2020, ratifying the NYC. More significantly, a new Arbitration and Conciliation Working Procedure Proclamation Number 1237/2021 was enacted April 2, 2021.

Ethiopia, Prior to the new proclamation's passage, the 1960 CC Articles 3325–3346 and the CPC Articles 315–319, and 350–357 largely covered arbitration and conciliation. Additionally, as part of the implementation of proclamation, Article 461 of the CPC lays out the requirements for the enforcement of arbitral awards. There existed a few scattered legal provisions controlling the conciliation and arbitration of particular issues. Additionally, arbitration is one method for settling state-state and investor-state investment disputes in the bilateral investment treaties that Ethiopia signed.<sup>47</sup>

Proclamation No.1237/2021 and has rendered the following articles of the CC repealed; Articles 3318 to 3324 of the CC, on conciliation, and Articles 3325 to 3346 on arbitration. Moreover it also repealed the arbitration-related provisions of Articles 315 to 319 of the CPC as well as Articles 350, 352, 355 to 357, and 461 of the Code.

The Proclamation, it sets out that the place or seat of the arbitration is deemed to be where the arbitral award is made. <sup>48</sup>In this regard, the proclamation provides the following definition for ‘foreign arbitral award’;

*An Arbitral award which is deemed to have been rendered in a foreign country in accordance with international treaties acceded and ratified by Ethiopia or a decision in which the seat of arbitration is mentioned to be outside of the Ethiopian territory;*<sup>49</sup>

And also an arbitration award is defined as a decision made by a permanent arbitral institution or by an ad hoc arbitral body created by the agreement of contracting parties under Ethiopia's proclamation Art.2(2).

The award must include the relevant facts in dispute, the parties' names and addresses, the nationality of the arbitrators, the reasons for the award, the costs of the arbitration and the

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<sup>47</sup> Interview with Negus Teazazu Deputy Director General of Civil Affairs Administration on September 15, 2022

<sup>48</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz., year 27, No. 21. Art.2/8/.

<sup>49</sup> Ibid. Art.2./8/

method of payment for those expenses, as well as the date and location of the award-making process.<sup>50</sup> The updated definition now includes electronic communication between the parties that uses data messages as well as other factors including form and manner of communication. This term is comprehensive and covers all contemporary modes of communication; hence it must be included in our legal system in order for such agreements to be enforceable. The arbitral award must be in writing and signed by the arbitrator or arbitrators, if not by all, and then at least by the majority of the arbitrators, together with a note explaining why the remaining arbitrators' signatures were not included.<sup>51</sup> Under Ethiopian law, there is a pattern that may be seen in the formal requirements at different phases of arbitration: there is a strong emphasis on writing as a means of documenting events and evidence and facilitating communication among all parties.

## **3.2. Standard Procedures of Arbitration and Recognition and Enforceability Arbitration award**

### **3.2.1 Standard Procedures for Arbitration**

The Arbitration and Conciliation Proclamation No.1237/2021 can be regarded to encourage and facilitate arbitration. It introduces arbitration as a dependable process for resolving disputes with outcomes that are enforceable and binding. It is portrayed as being a regulated process that cannot be thwarted by using delay tactics. For instance, unless it is granted by the arbitration tribunal or the court, a challenge to the appointment of an arbitrator cannot halt the proceedings. Additionally, the Act aims to reduce court involvement in arbitration processes. For instance, until the arbitration processes are through, the arbitral tribunal decides on its own jurisdiction without the prospect of court intervention.

### **3.2.2. Standard Procedures for Recognition and Enforceability Arbitration Award**

The NYC mandates that each contracting state "shall not impose substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this convention applies than are imposed on the recognition or enforcement of domestic arbitral awards" when it comes to the procedures for the enforcement of foreign awards.<sup>52</sup> The word 'conditions' must be considered as referring to procedural rules,<sup>53</sup> such as

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<sup>50</sup> Ibid. Art 44/3/

<sup>51</sup> Ibid. Art 44 /1/ and /2/

<sup>52</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York Convention,1958, Article III.

<sup>53</sup> Van den Berg, A.J. The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, p.239

the method of enforcement, and the competent authority; it is therefore not concerned with the conditions for enforcement.<sup>54</sup>

The term "substantially more onerous" suggests that the NYC may permit contracting States to apply different procedural rules to local awards and foreign awards, but the Article emphasizes that the distinction should not be maintained to the point where enforcement of foreign awards becomes "substantially more onerous," otherwise the procedural rules will violate Convention obligations. However, it is argued that the Convention will apply if a contracting party does not have any regulations guiding the process for enforcing foreign arbitral awards other than the enforcement procedures for domestic awards.<sup>55</sup>

As a result, it might be claimed that each contracting State must fairly enforce international arbitral awards in order to comply with the NYC. According to the NYC, the national law of the country where enforcement is sought governs the process for recognition and enforcement.<sup>56</sup>

Ethiopia ratified the Convention with two declarations and one reservation. Ethiopia expressed concerns specifically about the commercial nature of legal relationships. The Convention will only be applicable to awards arising out of legal relationships, whether contractual or not, that are regarded as commercial under Ethiopian national law. The first is that the Convention will only apply to the recognition and enforcement of awards made on the territory of another contracting state.<sup>57</sup>

The "commercial reservation," which states that Ethiopia will only apply the Convention to disputes arising out of legal relationships that are considered commercial under national law and the so-called "reciprocity reservation," which states that the Convention shall only be applicable to arbitral awards issued in another ratifying State, was made by Ethiopia when it ratified the Convention.<sup>58</sup> Although in theory the reciprocity reservation is still significant for determining whether the Convention is applicable, in practice the reservation is now essentially irrelevant. Due to Ethiopia's ratification of the NYC, international arbitral awards from the nearly 171 NYC member<sup>59</sup> nations must be automatically recognized and enforced by Ethiopian courts unless they are overturned for one of the few reasons specified in the NYC.

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<sup>54</sup> Di Pietro, D. and Platte, M., op. cit. p.128; Van den Berg, A.J. The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, p. 239.

<sup>55</sup> Onyema, E, 'Formalities of the Enforcement Procedure (Articles III and IV),

<sup>56</sup> Van den Berg, A.J. The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation, P. 236;

<sup>57</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification. Proclamation 2020. Proc. No. 1184, Fed. Neg. Gaz., year 21, no.21 Art.2/1/

<sup>58</sup> Ibid Art2/2/

<sup>59</sup> [https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=8&opac\\_view=-1&menu=715](https://newyorkconvention1958.org/index.php?lvl=cmspage&pageid=8&opac_view=-1&menu=715)

The new proclamation required oral hearings; the disputing parties had the right to choose the arbitration's norms of process and location; accountability; third-party involvement; support from the court in receiving evidence; and oral and written arguments; By agreement, the contracting parties may specify the language to be used, as well as allow for the appointment of umpires and the leave of arbiters. Arbiters may be given authority by the parties in dispute to serve as amicable compositors. Unless otherwise agreed, the award must have been made soon after the appropriate court received the request for arbitration. A set of procedural norms more in line with those accepted by the rest of the world were adopted with the replacement of the CC and CPC by the proclamation No.1237/2021.

The proclamation also differs based on whether Article 53, of the NYC is applicable. Courts will enforce foreign awards in conformity with the NYC if they are made in a state that is a party to the Convention. According to Article 53(1) of the proclamation, which states that "*recognition and enforcement of a foreign award subject to the NYC shall be governed by the Convention,*" a foreign arbitral award rendered in a member state of the NYC will be upheld. The proclamation for the Recognition and Enforcement of a Foreign awards, Article 53/2/ governs the enforcement of a foreign arbitral award that is not covered by the NYC. Since the NYC's ratification and implementation in November 2020, Ethiopian courts' procedures have not yet been put to the test.

A foreign arbitral award must be made an order of court to be enforceable in Ethiopia, through an application to court under Art.51 of the proclamation. In accordance with the CPC, an arbitral award made in Ethiopia or in a foreign country may be executed by applying to a court that would have had jurisdiction to do so had the case been heard by a court. The arbitration agreement, the original award, or an authenticated copy of the award must all be produced by a party seeking the recognition or execution of a foreign arbitral awards. When an arbitration award is presented to Ethiopia for recognition or enforcement, it must first be validated by the appropriate body and translated into the court's official language.<sup>60</sup>

As a result of these two reservations, an award is treated as a NYC award under the proclamation if it was rendered in a country that is also a party to the NYC in respect of a commercial dispute determined by Ethiopia law. This apparent limitation is not that relevant in practice because the majority of foreign arbitral awards presented for enforcement in Ethiopia are rendered in countries that are parties to the NYC and concern commercial matters.

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<sup>60</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz, year 27, No. 21. Art.51/2,3,4,/

The new law has many good things to enforce arbitration awards, but according to article 51/1/ of the proclamation, arbitration awards given in Ethiopia or abroad are considered binding. There is a clear provision that if the case were to be heard by the court, it would be submitted to the court that can enforce the award, according to the law of CPC. This means that it will be executed in accordance with the existing civil procedure judgment enforcement provisions from 371 to 455. There is no other specific enforcement law. This is not fulfilling the purpose of the proclamation in view of the current court proceedings and the fact that the procedure will be carried out according to the law without the main problem of execution. Because the current process of court execution debate is very slow and time-consuming, and according to this system, it is difficult to say that the award given by the arbitrators will be carried out smoothly.

Some countries, the Supreme Court has issued its own rules to implement arbitration award and make it happen separately from the normal court process. Therefore, this award given by the arbitrators should be carried out in the spirit of the new law if they give an award based on the law.

Apart from this, if it is said that it should be carried out according to the law of civil procedure in Ethiopia, they will not be able to make an efficient enforcements by allowing the use of a civil procedure code that is easy and free for the parties to achieve the purpose of the proclamation set in the preamble of the proclamation. Therefore, the foreign Arbitral award should not be proceeding according to the civil procedure code during the court process to enforcement the foreign Arbitral award. My opinion that a court ruling should be issued by the courts or the relevant body to enforce the foreign Arbitral award.

### **3.3. Competent Authority dealing with the Recognition and Enforcement of Foreign Arbitral Awards in Ethiopia**

Aside from issuing an order granting a party the right to enforce the award, the arbitral tribunal generally lacks the jurisdiction to actually carry out its decision. Therefore, if the losing party refuses to voluntarily comply with the award, the winning party will attempt to enforce the award in any nation where the losing party's assets are located. Different countries have different competent authorities who deal with the recognition and enforcement of foreign arbitral awards. The majority of the time, court or public offices are the appropriate enforcement jurisdiction.<sup>61</sup> The majority of states grant the court jurisdiction to issue an enforcement order that gives it the authority to enforce foreign arbitral awards, however there

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<sup>61</sup> David, R. Arbitration in International Trade, 1985,p. 368-369

may be variations in which specific court is given this jurisdiction. For instance, In Republic of Mauritius,<sup>62</sup> Republic of South Africa<sup>63</sup> and Korean<sup>64</sup> are courts have jurisdiction over execution foreign arbitral awards.

Article 51(1) of the Proclamation stipulates that Ethiopian arbitral awards are enforceable under the same circumstances as international awards made by other arbitrators. According to Article 53/3/, the Federal High Court has jurisdiction to enforce foreign arbitral awards.

According to the Proclamation and the old civil procedure law, it is the federal high court that has to enforce the arbitration awards given in foreign countries. The new law did not come with anything different. If this is the case, it means that it will be the job of the courts to organize separate hearings to enforce the award of arbitration courts in foreign countries. In other countries such as Mauritius, however, according to the arbitral Act, six judges appointed by the Supreme Court have been assigned a hearing to enforce the awards given by the arbitrators and organized a separate hearing. But when we look at the law in Ethiopia, there is nothing in the proclamation about the existence of a separate trial organization beyond the fact that the High Court has jurisdiction. Therefore, a separate trial should be organized in the High Court to enforce the award of the arbitration.

However, when they come to the courts to enforce arbitration awards, if it is to be mixed with any judgment or decision based on the current court procedure. If it is treated equally with other court cases when it comes to the court to enforce the arbitration awards, it means that the case will drag on. This is contrary to the purpose of the preamble Arbitration and Conciliation, Working Procedure Proclamation No.1237/2021 and will not be execution in a speedy and cost-effective manner.

*arbitration and conciliation help in rendering efficient decision by reducing the cost of the contracting parties, protecting confidentiality, allowing the participation of experts and the use of simple procedure which provides freedom to contracting parties;*<sup>65</sup>

Therefore, it can be understood from the preamble of the Proclamation that the parties should be able to settle their cases through arbitration efficiently and without incurring unnecessary costs. However, with this focus on the detailed laws of the proclamation, there is no provision that stipulates how the arbitration awards can be execution in an efficient and cost-effective manner.

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<sup>62</sup> Mauritius INTERNATIONAL ARBITRATION ACT 2008 Articles 43.

<sup>63</sup> Republic of South Africa International Arbitration Act, 2017 Articles 14.

<sup>64</sup> The Korean Arbitration Act Article 37

<sup>65</sup> The preamble of Arbitration and Conciliation, Working Procedure Proclamation No.1237/2021.

Judge Dawit Belay, who is a judge of the Federal High Court, who has experience in executing arbitration awards in this matter, was asked and his answer, was that Ethiopia is a member country by ratifying the New York Convention, On the other hand, nowadays the business community prefers to settle the matter in arbitration instead of bringing it to court, Also, if Ethiopia wants to be competitive with member countries or other countries, it should be included in the regulations to implement the proclamation by legislating it has to include a special court for arbitration awards and assigning judges who have received special training in the case in order to implement it in a smooth and cost-effective manner. He answered.

Therefore, according to arbitration and conciliation proclamation Art. 80/1/ it are known that the authority to make regulations is given to the Council of Ministers. Therefore, it is clear that the regulations will issue a detailed law to be implemented. Therefore, in order to implement the purpose of the proclamation, provisions should be included to allow for the appointment of a special hearing and judges specially trained in arbitration when submitting to the court to enforce the arbitration awards.

### **3.4. Limitations Concerning Interim and Preliminary Measures**

One of the key concerns in creating a legislative framework for arbitration is the availability and administration of interim measures in international commercial arbitration. When concerns about the protection of evidence and assets arise before or during the course of the arbitration, the availability of interim remedies or their lack can have a significant impact on the outcome.

The Proclamation also marks a significant departure in that it specifically authorizes arbitral tribunals to take interim remedies and specifies the circumstances in which they may do so. The Tribunal is empowered to order a variety of preventive interim actions, such as making decisions that appropriately preserve and maintain goods or assets that are part of the dispute; to preserve under the custody of third party or sale of perishable goods,<sup>66</sup> To preserve relevant evidence,<sup>67</sup> To preserve assets and funds against which an arbitration award may be given,<sup>68</sup> To allow the continuation of the existing conditions or to restore the status quo pending resolution of the dispute and determine the matters that may be the subject of an arbitration awards,<sup>69</sup> with the parties cooperation or on its own initiative.<sup>70</sup> Any interim relief

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<sup>66</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz, year 27, No. 21. Art.20/2/b/

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid. Art.20/2/d/

<sup>70</sup> Ibid Art.20/2/

granted by arbitrators, regardless of the location of the relief's issuance, is binding in Ethiopia.<sup>71</sup> The parties are also free to require the court for the issuance of interim measures.<sup>72</sup>

The Proclamation, Under Article 20(3/), before deciding on a final award, the arbitration tribunal may render interim decisions or rule on a portion of the claims. Partial awards resolve some of the major concerns and are typically given based on the importance of certain issues. The requirement that the interim award be:-

*"It essential to take interim measures relevant to the subject matter of the dispute under arbitration procedures."*<sup>73</sup> Is open to a rigorous interpretation that allows for the approval of only temporary measures that are closely relevant to the dispute's topic.

Any interim measures that an arbitral tribunal deems necessary may be ordered at a party's request, and they are now legally binding.<sup>74</sup> The relevant party used to comply with an interim order of an arbitral tribunal even though it was not legally required because they were afraid the tribunal would reach a negative decision if they didn't. The new proclamation approved all of the temporary measures allowed by the Model Law, with the exception of preliminary orders. Parties have the right to request that interim orders issued by arbitration tribunals be recognized and upheld by courts under Article 27 of the proclamation.

### **3.5. Grounds for Refusal of Recognition and Enforcement of Foreign Arbitral Awards under Ethiopia**

The losing party may submit an application to national courts to contest the arbitral awards after the arbitrators or arbitral tribunals have made them. Arbitration awards that have been overturned are one reason for refusing to recognize and enforce them, according to the NYC.

There are two sets of provisions in Art. V. The most fundamental values of justice and party autonomy are protected by the first five grounds for refusing enforcement listed in Art. V (1). Party incapacity is one of them, along with the arbitration agreement's invalidity, the violation of due process, and the scope of the submission being too broad, the tribunal's improper composition, material procedural irregularities, and the fact that the award hasn't yet taken effect or has been overturned. These defences are only available to losers who must establish them; the enforcing court cannot bring them up on its own.<sup>75</sup>

In contrast, Art. V(2) concentrates on the local law and enables each contracting state to defend its national interests and moral standards by allowing enforcement to be denied on the

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<sup>71</sup> Ibid Art.25/1/.

<sup>72</sup> Ibid Art.25/2/.

<sup>73</sup> Ibid Art. 20(1)

<sup>74</sup> Ibid Art.20/1/.

<sup>75</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Art. V(1)

grounds of non-arbitrability and violation of public policy, which issues can be raised by the enforcing court on its own motion.<sup>76</sup>

Arbitration and Conciliation, working Procedures Proclamation No. 1237, In Ethiopia's was enacted in 2021. Accordance to Articles 50 and 52 was determined that the grounds for setting Aside an arbitral awards shall be the same as the grounds for refusing to enforce international arbitral award under Article V of the New York Convention. Ethiopia Arbitration Law states that there are comparable rules for annulling domestic arbitral awards and (refusal) grounds for enforcement of international arbitral awards. Similar criteria are used to decide applications for annulling and refusing arbitral awards.

Article 50 of the Arbitration and Conciliation, Working Procedures Proclamation. No. 1237/2021 Recourse against an arbitral award may be raised only by an action for setting aside such arbitral award to a court. An arbitration award may be set aside by the court only if: The party making an application for setting aside furnishes proof that:

*The applicant does not have the capacity to conclude an arbitration agreement as provided for in the law in force;(b) the agreement is not valid under the law to which the parties have subjected it, or under the law of the Ethiopia, or such agreement has expired; (c) A party making the application was not given proper notice of the appointment of an arbitrator or of arbitral proceedings or was otherwise unable to present his case during the preceding; (d) The arbitrators did not make the award by maintaining their impartiality or independence or have delivered the award by receiving bribe;(e) The subject matter of the arbitral award is beyond the scope of the arbitration agreement or the award rendered is beyond jurisdiction the tribunal; (f) The process of establishment of the tribunal and the procedure applicable in the course of the proceedings contradicts with agreement of the contracting parties and has influenced outcome of the award.*

If any of the following apply, the arbitral award may be vacated by the court: (a) The matter upon which the award is based is not arbitrable under the Ethiopian arbitration law; (b) The recognition and enforcement of the arbitral award creates problem on public morality, policy or national security.<sup>77</sup> *The court to which an application to set the award aside may suspend the arbitral award for not exceeding 60 days in accordance with the Civil Procedure Code before a decision is made on the application.*<sup>78</sup> There is no right of appeal from a court's ruling regarding decisions made by other courts for setting aside awards are not allowed.<sup>79</sup>

In fact, Article 50's sole recourse is to set aside an award, and it offers the justification for doing so. These grounds are the same as those in Article V of the New York Convention, which lays forth the reasons why an arbitral award cannot be enforced. The main distinction between these two articles is that whereas an application for recognition or enforcement may be filed to a court in any State, an application for setting aside under Article 50 may only be submitted to a court in the Country/Ethiopia/ where the award was delivered.

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<sup>76</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958, Art. V(2)

<sup>77</sup> Arbitration and Conciliation, Working Procedures Proclamation. No. 1237/2021, Art.50/4/.

<sup>78</sup> Arbitration and Conciliation, Working Procedures Proclamation.No.1237/2021. Art.50/5/

<sup>79</sup> Arbitration and Conciliation, Working Procedures Proclamation.No.1237/2021. Art.50/8/

The exhaustive list of grounds for setting aside should, however, only be strictly interpreted in light of the narrow scope of judicial intervention in ICA. Furthermore, none of these grounds authorizes a review of the merits of the dispute, and because Article 50 is a required clause, the parties cannot contract out of it.

Article 52 of the Arbitration and Conciliation, Working Procedures Proclamation. No. 1237/2021 regulates the reasons for refusing recognition or execution of arbitral awards. Its format and content are comparable to those of Article 50, which concentrates on the reasons for annulling an arbitral ruling. Despite being based on the New York Convention (1958), Articles 50 and 52's area of application is under Ethiopian law.

Article 52 provides for eight grounds; however, while they are listed exhaustively, they should be interpreted narrowly. Just like Article 50, the grounds for non-recognition and non-enforcement are divided into two groups. (1) An objection to the enforcement of arbitral award may only be made, where an application made to the court previously to have the award set aside has not been dismissed. Article 52/2/ specifies six grounds; indeed, while five of them are the same (as those listed in Article 50(2)), there is one additional ground.

The first ground addresses, *the person who objects to the enforcement was under legal capacity pursuant to the law applicable to him or if the arbitration agreement is null and void under applicable law chosen by the parties or, in the absence of such agreement, under Ethiopian law*; The second ground for non-enforcement is the violation of due process, *the applicant shows that he has not been given proper notice about the appointment of the arbitrator or the arbitral proceedings or has not been able to present his case*. Whether or not the due process has been violated has to be determined by reference to Article 28 wherein due process means an equal treatment of both parties and a full opportunity to present the case. The third ground, *the arbitrators did not grant the award by maintaining their impartiality and independence or have delivered the award by receiving bribe*; the fourth ground, *The subject matter of the arbitral award is beyond the scope of the arbitration agreement or the award rendered is beyond the jurisdiction of the tribunal*; the fifth ground, *The process of establishment of the tribunal and the procedure that has been implemented in the course of the proceedings contradicts with agreement of the contracting parties or the provisions of this Proclamation and has impacted the outcome of the award*; the sixth ground, *The arbitral award has not reached its final stage or is reversed or suspended*.<sup>80</sup>

Additionally, recognition and enforcement of the arbitral awards may be refused in the recognizing or enforcing State if doing so would be against public policy. Several important issues in the framework of public policy are addressed here. First, the court may decline to accept or implement the award on the basis of public policy only in cases when doing so would go against Ethiopia's fundamental moral principles. Second, both procedural and substantive difficulties may be involved with the public policy objection. In fact, the procedural issue that raises the public policy concern primarily relates to the lack of due process. The writer has not found any court rulings or submissions on the same issue. Therefore, the law will be tested in the future.

### **3.6. Direct Review of Arbitration Award on Questions of Law or Fact**

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<sup>80</sup> Arbitration and Conciliation, Working Procedures Proclamation.No.1237/2021.Art.52/2/

The finality of the ruling is one of the factors that make the arbitration process so appealing for commercial conflicts. One of the remarkable aspects of the arbitration procedure is the lack of a substantive review mechanism, and generally, an appeal on the merits of the case is not allowed.

Few jurisdictions still allow direct judicial appeals from arbitral verdicts outside of the arbitration procedure. England is one well-known instance. The English Arbitration Act expressly permits direct appeals in certain defined situations, but only in cases involving issues of English law and only with the consent of all parties to the arbitration or with the court's permission.

In practice, only a small percentage of applicants pass the leave criterion, which is meant to catch all but the most deserving appeals. Additionally, parties may opt out of these clauses by stating waiving the right of appeal in the agreement or by choosing arbitration rules that specifically waive any right of appeal or other rights of recourse, such as Article 35(6) of the ICC Rules and Article 26(8) of the LCIA Rules.

One of the reasons why the arbitration proceeding is so attractive to commercial disputes is because of finality of the award. The absence of substantive review mechanism is one of the striking features of arbitration process and generally, appeal on the merit of the case is not permitted. There is always a temptation from the losing party what to appeal for the reversal of the Tribunals finding. This is well noted by a seasoned arbitrator when he said” efficient arbitration implicates a tension between the rival goals of finality and fairness. Freeing awards from judicial challenge promotes finality, while enhancing fairness calls for some measure of court supervision. Arbitration’s winner looks for finality, while the loser wants careful judicial scrutiny of doubtful decisions.

The proclamation adopts a presumption that, unless the parties agree differently in their arbitration agreement, arbitral awards are final and not subject to judicial review.<sup>81</sup> Article 49(2) of the Proclamation allows parties to apply for cessation (highest instance of appeal) “where there is a fundamental or basic error of law”, but parties may waive the right of appeal. Therefore, the possibility of challenging final arbitral rulings through the appeals procedure still exists unless the parties may agree to forego judicial review for legal errors. This is separate from the set-aside provision of Article 50 of the proclamation, which mirrors

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<sup>81</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz., year 27, No. 21. Art.49/1/

the UNCITRAL Model Law's grounds for setting aside arbitral awards and thus requires that judicial review of arbitral awards<sup>82</sup> be limited to narrow and well-defined situations.<sup>83</sup>

### **3.7. The Role of the Court in Arbitration Proceeding and Court Intervention**

In more recent times, judicial assistance to the arbitral process and the supervision of the arbitral process has been the two main divisions of court action in international commercial arbitration (ICA).<sup>84</sup>The typical roles of the courts are to (i) keep arbitration separate from the courts, (ii) refer the parties to arbitration, (iii) enjoin or compel the arbitration, (iv) review arbitral awards, and (v) recognize and enforce arbitral awards.<sup>85</sup>

Article 5 of The Model Law also sets strict limits on judicial intervention; national courts should only get involved in unusual situations, which are fully described in the Model Law. In fact, the Model Law's restriction on court intervention the idea that national courts should only step in when absolutely necessary is intended to prevent any unforeseen or disruptive judicial interference with the arbitral process. For the parties, particularly international parties who select arbitration, this prevention is indeed crucial.<sup>86</sup>Although the phrasing of Article 5 restricts court interference, it also suggests a potential area of court control; as a result, this provision has come under fire for failing to express an opinion on what role the courts should play in supporting or overseeing arbitration.<sup>87</sup>

This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe. The proclamation, Art 5 is great importance. It enacts Article 5 of the Amended Model Law and enshrines the principle of non-interventionism.

According to the proclamation, the parties have the right to challenge the arbitrators' independence, impartiality, and other qualities. If an arbitrator was the target of an objection, the uncontested arbitrators will determine whether to raise it, and in the event of a tie, the president of the arbitration institution or an ad hoc committee will have the final vote. The awards of the contested arbitrators may be appealed to the court, in accordance with Article

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<sup>82</sup> United Nations Commission on International Trade Law Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, Article 34

<sup>83</sup> P. Ortolani, Article 34: Application for Setting Aside as Exclusive Recourse against Arbitral Award, in UNCITRAL Model Law on International Commercial Arbitration: a Commentary, eds. I. Bantekas, et al., 2020, p.859.

<sup>84</sup> W. Laurence Craig, Some Trends and Developments in the Laws and Practice of International Commercial Arbitration, 30 Tex. Int. L. J. 1, 1995, p 48.

<sup>85</sup> Matthew B. Cobb, Domestic Courts' Obligation to Refer Parties to Arbitration, 2001, p. 313.

<sup>86</sup> Part Two; Explanatory Note by the UNCITRAL secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, 1 UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006, 21 2006. p 27.

<sup>87</sup> Gerold Herrmann, op. cit., p 15.

15(4) of the proclamation. Additionally, the announcement states that the arbitration case would be suspended until the court's decision on the objection.<sup>88</sup>

The contracting party may apply to the tribunal, in accordance with Article 16/1/ of the proclamation, if the arbitrator(s) are unable to adequately discharge. They could, however, file an appeal with the court if they are not happy with the court decision. This ruling is worse than what is stated in CC Article 3343, which states that if the arbitrator delays in doing his duties, the authority agreed to by the parties may decide on the application, and there is no right of appeal.

The arbitration proceeding shall be pended until the court provided its judgement. This cause inconvenience, delay and unnecessary cost to the proceeding. This provision at least should be reframed in a manner that the challenged arbitrator may continue to entertain the matter until the court decides on the objection.

According to Article 5 of the proclamation, it is clearly stipulated that the courts cannot intervene in arbitration except for the powers granted to them by the proclamation. But when the proclamation is seen, there are different provisions through which that the courts interfere in the arbitration process for different reasons. Basically, the courts should intervene in the arbitration process to support the arbitration process.

This means that in order to enforce the interim measures rendered by an arbitral tribunal, taking evidence on request from the arbitral tribunal, the parties can enter to name or choose if they do not agree. Apart from this, the Ethiopian courts intervene in the arbitration process and keep the decision regarding the objection of the arbitrators suspended. Circumstances of delaying the case are created. Since this arbitration agreement is mainly a good will agreement between the parties, it is not appropriate to delay the arbitrator's court that they have entered into and chosen by intervening. I am of the opinion that the number of court interventions in this regard should be reduced and adjusted as it is inappropriate for the court to intervene and delay.

Since Ethiopia's new law came into force, a few cases have been brought before the Federal High Court, and that is according to the agreement made by the litigants after the opening of the civil case number **284097**, **273810**, **289854** and one other. Since it was closed in settlement and no other case was opened by the court, the proclamation has not yet been tested in practice.

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<sup>88</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz., year 27, No. 21. Art 15/5/.

### **3.8. Limitation of Law and the Enforcement of Foreign Arbitral Awards in Ethiopia**

The period of prescription for enforcing an arbitral awards varies amongst national legislation. Therefore, it would be difficult for the win party to forego seeking the advice of an expert local consultant; the same may be true of a party seeking to block enforcement.<sup>89</sup>

A phenomena known as the limitation period can be viewed as universal. Ethiopia might learn from in order to put its law in line with international best practices, include limitation periods that are recognized as arbitration-friendly and evaluated as acceptable worldwide standards.

In its provisions for the recognition and enforcement of foreign awards, the NYC did not set a deadline for requesting such recognition or enforcement. However, its Article III stipulates that the rules of the jurisdiction where recognition or enforcement is sought apply to the question of the limitation period. By granting this freedom, the Convention enables contracting States to set a deadline for requesting the recognition and execution of foreign arbitral awards. It should be noted that the Convention stipulates reasons why a foreign award may not be recognized or enforced, and the passing of time is not one of those reasons.<sup>90</sup>

The proclamation does not specify the exact length of an arbitration proceeding. The Law has made suitable provisions to prevent the reopening of old complaints that have been allowed to drag on for unnecessarily lengthy periods of time without being resolved within the legally required reasonable time frame. A cause of action becomes stale or statute barred after a party has allowed it to drag on past the permissible window for seeking relief.

According to Article 51/1/ of proclamation a foreign arbitration award is considered binding and the case can be enforced in the court, but the court is governed by the current CPC. If this is the case, it means that it will be in accordance with the judgment execution provisions of the CPC Art. 371 to 455. In terms of timeline, there is no statutory timeline set. The timeline for recognition and enforcement procedure depends on the complexity of the matter. Courts, in practice, It must be submitted within ten years from the date of the judgment according to Art. 384 the Civil Procedure code.

The New Arbitration Law does not specify laws or regulations governing the start or exact length of arbitration proceedings that are special to arbitration. However, the applicable statutes impose time limits on individual claims. It is necessary to include a time limit or length for execution of the award in the Proclamation, as is the case in the USA and China.

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<sup>89</sup> Redfern A., and Hunter, M., op. cit. p. 10-18

<sup>90</sup> The Recognition and Enforcement of Foreign Arbitral Awards, New York Convention,1958, Article V

They continued by arguing that parties choose arbitration because it is quick and the enforcement is timely done.<sup>91</sup>

### **3.9. Practical Difficulties for the Enforcement of Arbitral Awards in Ethiopia**

Ethiopia has become a member state of the New York Convention by ratified it in accordance by proclamation No. 1184/2020. Also, enacted of the Arbitration and conciliation working procedure proclamation No. 1237/2021, which helps to implementation arbitration awards in foreign countries and within the country, is a proof that it has taken a big step forward.

Currently, there are 171<sup>92</sup> countries that have ratified the New York Convention. This shows that most of the countries are members of the New York Convention. This also shows that countries or the business community prefer to go to arbitration instead of going to court to resolve disputes arising from their agreements, and they also go to court to execution arbitration awards. That is why the New York Convention has been accepted and ratified by most of the international agreements made by the United Nations.

Ethiopia has ratified the New York Convention by proclamation No 1184/2020. Therefore, it means that arbitration awards submitted in Ethiopia must be execution in accordance with the New York Convention. If this is the case, it is not possible to reject an arbitration awards for any reason other than the reasons provided in accordance with Article 5 of the New York Convention.

Although two years have passed since Ethiopia ratified the New York Convention and put the new law arbitration into practice, it is difficult to enforce a foreign arbitration award when it comes to Ethiopia to enforce it, especially if the award is paid in foreign currency. As it is known, due to the current scarce of foreign currency, it is not considered to be implemented. In Ethiopia, foreign currency that a person or company should hold is limited and prohibited by law. National Bank of Ethiopia directives No. FXD/46/2017 Amendment to directives No. FXD/45/2016 Transparency in Foreign Currency Allocation and Foreign Exchange Management According to Art.6, who should get the foreign currency money first and the situation of the distributor has been detailed.

According to this directive, there is no provision for payment in foreign currency for arbitral award made in a foreign country. Therefore, it means that it is not paid in advance.

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<sup>91</sup> Answers obtained from the questionnaires by judge, lawyer and (data collected on 15 th August 2022).

<sup>92</sup> <https://www.newyorkconvention.org/countries>. Accessed, on January 22, 2023 At 3:50 pm.

Therefore, according to the approved New York convention, Ethiopia has agreed to enforce the arbitration awards given by another country, but it will not be enforced in the current default situation. Foreign currency is under the control of the National Bank, whether it is an individual or a bank, and foreign currency is paid only according to the instructions issued by the NBE. The directives also do not include foreign arbitration awards in the detailed for Foreign Exchange Allocation and priorities requirements of those who deserve to be paid.

So, in the current situation, it is very difficult to enforce the arbitration awards given from abroad in Ethiopia. Rather than going to the court to enforce the award, most of them go to the Civil Affairs Directorate of the Minister of Justice to resolve their cases through negotiation and considering the time and other expenses they have to pay, they leave no less than half of the money they are paid. In the current state of affairs, it is not possible to pay arbitration awards from foreign countries in foreign currency, and for this reason, instead of going to court and enforcing them; they are coming to the Minister of Justice to settle their cases by agreement and reducing the amount paid to them. For example, according to the awards given by the foreign arbitration of Salini, company with the Abay Dam, the awards that was given to be paid more than 900,000 dollars was negotiated to be paid to around 4,000,000 dollars, so that the case could be resolved<sup>93</sup>.

He told me that there are many other similar issues that have come to be resolved due to the lack of foreign exchange and are still in progress. The fact that the half of the client submitted a request to be paid according to the arbitration awards and returned it by not agreeing, and the amount should be reduced so that it should be paid to them without deduction, then according to the law of the country, only taxes and duties should be reduced. Apart from this, they do not agree with the awards that I got by law and should not be paid, and they talked to the defeated party and explained that they will take their money out of the country through the black market and that there is no problem

On the other hand, they said that they are in the process of resolving the issue by talking with the concerned government bodies as they have agreed to have their issues resolved through negotiations.

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<sup>93</sup> Interview with , Nguse Tiezazu, who is the Director of Civil Affairs Directorate of the Minister of Justice.(October, 8, 2022)

The current state of foreign arbitration awards that come to Ethiopia, the National Bank will not convert the money into dollars or euros and this is a big problem that they face in their work.<sup>94</sup>

At the time of this research, there are four records of cases brought to court under the new proclamation. Among these records, record number 273810 is submitted to execute the awards given by the arbitral tribunal of England (GAFTA) on 28/02/2010 E.C. The court ruled that according to Proclamation No. 1184/2020, Art. 2/1/, it was an award made before ratify the Proclamation, and according to Art. 461/1/A civil procedure, it was not accepted on the basis of the reciprocity principle on 19/02/2014 E.C. is closed. F/no. 284097 is an arbitration award rendered by China, and both disputing parties are Chinese Company, and they have agreed to settle their case through negotiations. No. 289854 is a pending case filed to enforce an interim measure rendering by a foreign arbitration. The other one has been submitted in the domestic arbitration award and is still in the process of execution.

Therefore, according to the new proclamation, the court has not been presented with a sufficient record to enforce the foreign arbitration awards, and according to the order given by the court, the issue of whether or not the money in foreign currency will be implemented in the court's work is not seen now, it is something that will be seen in the future.

Therefore, this is not clearly stated in the law, but it is a matter that is being dealt with by practice as a reason for the arbitration awards not to be implemented. Therefore, it is clear that the law should be respected or what is called custom, basically, the law should be respected. Therefore, this is a reason and provision that is not set in accordance to Article 52 of proclamation No.1237/2021 or Article 5 of the New York Convention, so the problem in this regard should be looked at and resolved, the experts I interviewed told me that it should be, and my opinion is the same. If this problem is not resolved, there will be no parties who will come to the Ethiopian court to enforce the foreign arbitration awards. Also, there will be no parties who will choose or agree to execute the awards in Ethiopia based on the arbitration agreement.

For this example, The Ethiopian Commercial Bank to charge the money that it did not pay according to the contract with English Company for the internet installation work. They

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<sup>94</sup> Interview with, Michael Teshom, a lawyer who works on arbitration,(August 12 , 2022)

explained to me that they were able to charge money by suspending the plane belonging to Ethiopian Airlines, which was in London City Airport in England at the time.<sup>95</sup>

Therefore, this arbitration awards that comes to charge foreign money is still being carried out by Company without taking it to court, and the parties (winners and losers) are talking to each other through illegal means and the money is being made to leave the country according to the illegal way (black market). I was told by a lawyer who is an expert in this matter who did not want to be named.

Therefore, the fact that Ethiopia is a country that has approved the New York Convention and has issued the Arbitration proclamation No.1237/2021, and in order to be competitive with other countries and to enforce the purpose stated in the preamble of the proclamation, it means that a system must be established in which the arbitration awards that are presented to enforce the current dollar or foreign currency are carried out without any reason. If this is not the case, it means that there will be no contracting parts that come to the Ethiopian court to have their rights respected according to illegal.

Therefore, if the award given in foreign arbitration is paid in dollars or euro, the issue that hinders the execution of the award should be resolved. On the other hand, when an award is made to pay in dollars or euro in the regulations issued to implement the proclamation, it should be carefully looked at in what way the country should pay in terms of the foreign currency it has, and it should be issued as part of the law.

### **3.10. Legal and Institutional Reforms Needed to Implement the New York Convention in Ethiopia**

#### **3.10.1. Legal Reforms Needed**

This proclamation has brought many good things. Among them, third party intervention is allowed, the appointment arbitrators, courts cannot intervene if they are not allowed according to the arbitration law, government and private arbitration centres can be established, and the confidentiality of the arbitration process must be maintained. It is a law that leaves the jurisdiction to verify the validity of the arbitration agreement to the arbitrators and the authority to decide the dispute.

However, since the laws came into force, it has not been possible to see what the laws look like in practice, because there are a few records submitted by the courts based on the proclamation. Until the researcher conducted this thesis, there are only four records submitted

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<sup>95</sup> Interview with Liyu Tamru, who is an expert in international arbitration, (25 August 2022).

to the court. The submitted record is also some of them closed by agreement and the other on proceeding. The implementation of the law is not seen now and will be tested in the future.

### **Foreign Exchanges**

In Ethiopia to enforce an arbitration award given by foreign countries, the competent jurisdiction is the Federal High Court, according to Article 53/3/ of the proclamation. And arbitration award given by foreign countries is a decision based on the agreement made by the party, so it must be done quickly and in a fair time.

Currently, the biggest obstacle is that if the money is paid in dollars or euros according to the agreement made by the disputing parties, and if the winner is a foreign country in Company, and there is no business activity in Ethiopia, then the money should be received in dollars or euros according to the agreement. But it has reached a point where currency is not exchanged.<sup>96</sup> Basically, it is clearly stated in Article 53/1/ of the Arbitration Proclamation No. 1237/2021 that a foreign arbitral award given in a foreign country can be recognized or enforced in Ethiopia. From this point of view, National Bank is obliged to execute this court order. However, it is difficult to implement due to the current scarcity of dollars.

Therefore, according to article 51(1) of the proclamation, it is stipulated that the foreign arbitration award is considered binding and the procedure for its implementation is according to the current civil procedure law. Civil procedure is known that the provisions related to the execution of judgments of the procedural law are provisions issued 60 years ago. From the point of view of the purpose of the arbitration, it is not limited by time. On the other hand, there is no other law that determines the payment of foreign currency money based on the award of the arbitration.<sup>97</sup>

Therefore, Ethiopia needs a legal framework and institutions to become the main centres of arbitration. If this is the case, there is a need for a mandatory law that allows government institutions such as the National Bank and other arbitration institutions to implement the award in a short period of time. In particular, the settlement with dollars or euros should be paid and executed in an efficient way, just like other decisions. Therefore, the law itself should provide a binding law in this regard, but there is nothing said in this regard in the arbitration law that has been issued.

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<sup>96</sup> Interview with , Nguse Tiezazu, who is the Director of Civil Affairs Directorate of the Minister of Justice. (October, 8, 2022) and Interview with, Michael Teshom, a lawyer who works on arbitration,(August 12 , 2022)

<sup>97</sup> directives No. FXD/46/2017 Amendmente to directives No. FXD/45/2016 Transparency in Foreign Currency Allocation and Foreign Exchange Management

## **Needed of Special Bench for Arbitration Matters**

It is stipulated in Article 53/3/ of the proclamation that the arbitration award given abroad should be enforced by the Federal High Court. However, an independent hearing should be organized in the Federal High Court to enforce the arbitration award given abroad.

When we look at the experience of Mauritius in this case, there are five judges appointed by the Supreme Court to make the arbitration award, and there are independent rules of the court. Therefore, there is a rule to organize and conduct an independent trial.

Therefore, although it is appropriate for the Federal High Court to enforce foreign arbitration award, nothing has been said about the organization of hearings. If this is not the case, in terms of the existing Ethiopian court system is extremely sluggish, rigid and expensive, So the proclamation stipulates that the arbitration award will be governed by the Civil Procedure Law, and this will be seen in conjunction with other issues, and it will be very difficult to implement the proclamation in accordance with the purpose of the law and the principles of the New York Convention.

Therefore, it is appropriate to give the federal high court enforcement authority in the proclamation, but there is nothing about the organization of the trial. Therefore, the law should have clearly state about the organization of the trial. Therefore, since it is necessary to organize a separate trial at this level and since the current arbitration is accepted in all countries, it is important to be better than other countries, considering that the main jurisdiction to execution the arbitration award is the court, but it is appropriate to enforcement it efficiently and competitively, as regards the organization of the trial, unlike other cases ,The proclamation should be amended Or the regulations and directives issued to implement the proclamation should be issued clearly including the conditions under which the arbitration hearings should be organized and the Judges to be appointed. If this is not possible, the Federal Supreme Court should issue a court rule that enforces and governs the arbitration award, just like Mauritius.

### **Reciprocity.**

According to the Ethiopian Arbitration Law, the reasons why a foreign arbitration award cannot be enforced or recognized are detailed in Article 53/2 of the proclamation. One of these reasons is the principle of reciprocity.

Ethiopia is one of the countries that have ratified the New York Convention and is a member country. According to Article 5 of the New York Convention, it is clearly stipulated that arbitration award cannot be recognized or enforced.

Based on this, the provisions set forth in Article 53/2/, B, C, D, E, and F of the Ethiopian Arbitration Law as to the reasons for non-recognition or non-enforcement of a foreign arbitration award are the same as the provisions set forth in Article 5 of the New York Convention. But Ethiopia has put one more grounds in its own law that is not in the New York Convention. This is the reciprocity principle.

Ethiopia is a country that has ratified the New York Convention. Therefore, it should be subject to this convention. This means that it has the obligation to recognize and implement the arbitration award given by the countries that have ratified the New York Convention. This means that according to Article 5 of the Convention, it will have the right not to recognize or not to enforce it. On the other hand, according to Article 3 of the Convention, each member state must recognize and enforce arbitration awards given abroad in accordance with its own procedural law. It means that Ethiopia must recognize and implement the New York Convention.

Based on this, it is not appropriate to make the issue difficult by placing additional requirements on the member countries in addition to the requirements included in Article 5 of the New York Convention. Since Ethiopia is a member country of the convention, it is not appropriate to set a ground that foreign arbitration awards have not been executed or recognized, except for the provisions set out in Article 5. Therefore, it is not appropriate to set up substantially more onerous conditions in Article 3 of the New York Convention, which stipulates that Ethiopia should not recognize or enforce arbitration awards given abroad.

On the other hand, currently the signatory countries of the New York Convention have reached 171.<sup>98</sup> If this is the case, it means that there are few countries that have not signed it. From this point of view, when it is seen that there are many signatories of the New York Convention, it means that according to the convention, foreign arbitration award are execution without any reason in Ethiopia or any other country. It means that Ethiopia's reciprocity reservation set by the law will not be accepted. The ratification of the NYC means that Ethiopian courts have to automatically recognize and enforce foreign arbitral awards from close to 171 NYC member countries, unless the award is set-aside by the limited

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<sup>98</sup> <https://www.newyorkconvention.org/countries>. Accessed, on January 22, 2023 At 3:50 pm.

grounds listed under the NYC. However, the practices of Ethiopian courts since the ratification and coming into effect of the NYC in November 2020 is yet to be tested.

Therefore, when the reciprocity principle set forth in Article 53/2/(a) of the Arbitration Law is unacceptable in terms of the requirements set forth in Article 5 of the New York Convention, and as a substantially more onerous system has been established in accordance with Article 3, the law may be amended.

In addition, the business community is constantly in conflict with the execution of the contracts it enters into on a daily basis. Although it is common to use the courts to resolve disputes, due to the efficiency, cost-effectiveness and reliability required by the modern business environment, arbitration is increasingly preferred over the courts. This is because arbitration is a type of adjudication that allows a decision to be made by judges who are selected and appointed by the parties and who have special knowledge and experience in the case in an efficient process free from minor procedural provisions. From this point of view, arbitration is highly preferred in international trade. Therefore, since Ethiopia is a member of this and if it wants to be preferred and competitive, the law should be amended by issuing a provision on the principle of reciprocity.

### **3.10.2. The need to issue regulations or Directives to implement the proclamation**

Arbitration and Conciliation working procedure proclamation 1237/2021 under Art. 80/1/, it is clear that the Council of Ministers has the authority to issue regulations. In spite of this, if it is not clear who should make the rules for the implementation of the proclamation when it is issued, then the House of Representatives will make the proclamation. On the other hand, it is clear that most of the time, the directive is issued after the proclamation and the regulation, and it is a part of the law that is issued with detailed issues. If this is the case, it is clear that a government body established by law, which is closer to the issue, with the help of an expert, should issue the directives in a manner that allows for the provision of effective and efficient service.

From this point of view, the Ministry of Justice has been given authority under Article 80/2/ of the law to issue directives so that it can implement the regulations. However, it is not appropriate to give authority to the Ministry of Justice to issue instructions for the full implementation of the directives. Perhaps the Ministry of Justice may issue directives to enforce the regulations in certain cases. For example, according to Article 18(2) of the proclamation, it may issue guidelines for the licensing and monitoring of arbitration centres established in accordance with Article 18(2). Apart from this, it is not appropriate for the

Ministry of Justice to issue directives for the full implementation of the proclamation and regulations.

It is clear that the main point of the proclamation is to enforce awards given by arbitration in the country and abroad is to be implemented in accordance with the New York Convention. There should be arbitration proceedings and adjudication, which should be in accordance with the provisions of articles 28 to 40 of the proclamation about dispute proceedings the language used Proceedings, Commencement and Notification of Arbitral, Statement of Claim and Statement of Defence, Consequences of not appearing or not appearing in dispute between the contracting parties, Assignment of Expert, Support of Court in Receiving Evidence, Intervention of third Parties and Accountability Since such provisions are not detailed in the proclamation, it should be the Federal Supreme Court, not the Ministry of Justice, that should issue detailed instructions on the manner in which these debates should be conducted and led.<sup>99</sup> Because the case is mainly related to the courts, the Supreme Court is closer to the work than the Ministry of Justice.

The Arbitration and Conciliation working procedure proclamation 1237/2021 Art. 48 to 53 refer to termination of Arbitration Proceedings, Objections Raised Against Arbitral Awards, regarding the appeal, Execution of Arbitral Awards, and the Corrections, Interpretations and Additional Arbitral Award, It is clear that such cases are closely related to the court procedure when necessary to implement the proclamation. In addition, it is the Federal Supreme Court, not the Ministry of Justice, which should issue directives for the implementation of the proclamation in a manner consistent with the New York Convention that Ethiopia has ratified, in order to facilitate trade and investment activities and encourage foreign countries to come to the country. The reason is that most of the cases go through court debates, and the nature of the work and the legal gaps are the ones that can know more about this. Therefore, it is not appropriate to give the directives entirely to the Ministry of Justice. As stated above, it should be the Federal Supreme Court that should issue directives related to court cases. In contrast to the experience of other countries, for example, the Supreme Court of the country is working on how the process should be conducted when the judgment of Mauritius arbitration is brought to the court for execution.

The Federal Supreme Court should issue a directive to implement the proclamation, which is mainly related to the court-related litigation department. From this point of view, the directive to be issued to implement the proclamation should be given by the Federal General

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<sup>99</sup> Answers obtained from the questionnaires by judges, lawyers (data collected on 15 the August 2022).

Attorney or the Ministry of Justice only in a certain way, but the authority given to the Ministry of Justice to issue the directive for the full implementation of the decree is inappropriate and it seems to have forgotten that the main purpose of the proclamation is related to the process of court debate. This needs to be amended.

### **3.11. Reforms Needed in Courts**

The link between the courts and arbitration lies at the heart of arbitration law. The court must support arbitration in an acceptable manner while respecting the parties' awards to submit their dispute to arbitration rather than to court action. Courts can support the arbitral process by recognise them the appropriate power and authority, thus assuring both its efficacy and efficiency, in addition to refraining from taking unlawful action.

The proclamation stipulates that the Federal High Court shall have the jurisdiction to enforce any foreign arbitration awards. Consequently, before the arbitration award and agreement document can be submitted to the court for enforcement, the award must first be authenticated by the relevant organ.<sup>100</sup> Additionally, if the arbitration award is written in a language other than the court's official language, a translation shall be provided. This suggests that the award should be without delay implemented by the courts.

The organization of the trial, however, is not as good as it ought to be given the workload that the courts are currently under. There are no specialised courts or judges for handling arbitration related matters. The judges of the 1958 NYC and the conventions of other nations have very little information. The judges should receive sufficient training in order for them to uphold the court's laws and the agreements that Ethiopia has accepted. Additionally, the arbitrators' judges need to be knowledgeable and skilled in their respective fields.<sup>101</sup> In contrast, the courts should set up special panels to decide the arbitration case and publish arbitration award to direct the courts in handling the case. It must be evident.

Therefore, the courts should be prepared and be fit for the development of the country's trade relations and investment. Moreover, The Ethiopian courts will unavoidably need to be ready to enforce an arbitral award that is the result of a virtual hearing as international arbitration moves toward a new phase where virtual hearings are becoming the "new normal."

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<sup>100</sup> Arbitration and Conciliation Working Procedure Proclamation 2021, Proc. No. 1237, Fed. Neg. Gaz., year 27, No. 21. Art 51/3/.

<sup>101</sup> Interview made with highly experienced Federal High Court Judges of Lideta Civil Bench ,justice Seble Kiefe, Justice Dawit Blaye, Justice Danieal Gerema, Justice Mesel Negus and three other anonymous Justices), who is an expert in international arbitration, ( July – October, 2022);

### **3.12. Ministry of Justice**

The current Ministry of Justice has been established with other ministries according to Article 16 of the new proclamation No. 1263/2021 Definition of Powers and Duties of the Executive Organs. The authority and responsibility given to the Ministry of Justice by the proclamation are clearly defined according to Article 40 of proclamation No. 1263/2012. It is also stipulated that the Ministry of Justice will implement the provisions of Article 40/1/ of the Federal Attorney General's Establishment proclamation No. 943/2016.

According to article 6/8/e of proclamation No. 943/2016, the authority given to the former Federal Attorney General is to monitor the implementation of the international and continental human rights agreements that Ethiopia has approved or accepted, and to respond to the issues that arise in consultation with the relevant parties. It is a clearly stated matter that the National Performance Report will be prepared in collaboration with the relevant bodies. According to article 18/2/ of the arbitration and Reconciliation proclamation, it is given the responsibility of issuing directive for the establishment of control, licensing and renewal of arbitration centres.

Therefore, according to the authority given to the Ministry of Justice, it is the responsibility of monitoring the implementation of the Newark Convention and the proper implementation of this agreement by the Ethiopians. Based on this, strong arbitration institutions should be established in Ethiopia, both public and private. Also, when the awards given by arbitration in Ethiopia or abroad come to be implemented in accordance with the proclamation No. 1237/2021 and the New York Convention, the government bodies that verify the copies of the awards should be verified in an efficient way and those such as the National Bank should be made to carry out the responsibility given by removing the problem related to foreign currency.

Therefore, according to the authority given to the Ministry of Justice the responsibility of monitoring the implementation of the NYC and the proper implementation of this agreement by the Ethiopians.<sup>102</sup> The Ministry of Justice should work to eliminate the gap of knowledge among legal experts or lawyers by providing different skills and by making the centres for arbitration work open as soon as possible at the government or private level it should support them to get into work.<sup>103</sup>

### **3.13. Adaptation to New Reality of Videoconferencing**

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<sup>102</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards Ratification Proclamation No.1184/2020.Art.5

<sup>103</sup> Interview with Negus Teazazu Deputy Director General of Civil Affairs Administration on September 15, 2022.time on 11:00 Am.

The COVID-19 epidemic in 2020 gave rise to an overabundance of materials and publications regarding videoconferencing in international arbitration and associated enforcement difficulties. However, nothing is known about how Ethiopian courts feel about videoconferencing and how they would handle foreign arbitral awards made there that involve videoconferencing for hearings.

Parties all around the world have been forced to choose between "becoming virtual" or causing excessive delays in proceedings since the beginning of 2020. In order to do what was previously thought of as something unique, parties, counsel, courts, and institutions had flexibly adapted to the circumstance and had invented new and improved means of virtual hearings.<sup>104</sup>

By the end of 2020 and early 2021, the major arbitral institutions had adopted new rules to facilitate the use of videoconferencing in international arbitration, that have updated their arbitration rules to include expressly the features of a hearing being conducted remotely, virtually or by videoconference are the London Court of International Arbitration and the International Chamber of Commerce .

The LCIA Arbitration Rules have been revised as of October 1, 2020, to "confirm the primacy of electronic communication with the LCIA and in the arbitration, as well as to confirm the facilitation of electronically signed awards." They have also "expanded the provisions accommodating the use of virtual hearings, also supporting arbitrations taking place in the new normal."<sup>105</sup>

A new clause has been added to Article 26(1) of the ICC Arbitration Rules (2021) stating that "[t]he arbitral tribunal may decide, after consulting the parties and on the basis of the relevant facts and circumstances of the case, that any hearing will be conducted by physical attendance or remotely by videoconference, telephone or other appropriate means of communication" (emphasis added).<sup>106</sup> Arbitral institutions, users, attorneys, and arbitrators have all gained expertise using technology efficiently while balancing due process rights and speedy dispute resolution.<sup>107</sup>

As such, the importance of arbitral institutions, counsel and arbitrators being familiar with remote and virtual hearings, videoconferencing and technology, as well as guidelines to ensure their unified adoption and deployment, has been considered crucial.<sup>108</sup>

Arbitral institutions have adjusted their policies to allow for videoconferencing. For instance, article 24(2) of the 2016 International Arbitration Rules of the Korean Commercial

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<sup>104</sup> By Jae Min Jeon, Arie Eernisse, Hyojung (Kelly) Shin KOREAN ARBITRATION REVIEW 12th Issue (2021), p. 20.

<sup>105</sup> The London Court of International Arbitration (LCIA) Updates to the LCIA Arbitration Rules (2020), <https://www.lcia.org/lcia-rulesupdate-> available at August 12, 2022, time 4:00 pm.

<sup>106</sup> The newly amended ICC Arbitration Rules in force from 1 January 2021, available at <https://iccwbo.org/dispute-resolution-services/arbitration/rules-of-arbitration>, available at August 13, 2022, time 4:00 pm.

<sup>107</sup> Patricia Louise Shaughnessy, 'Chapter 2: Initiating and Administering Arbitration Remotely', in Maxi Scherer, Niuscha Bassiri et al (eds), *International Arbitration and the COVID-19 Revolution*, (Kluwer Law International 2020), p. 28.

<sup>108</sup> Jiyeon Hong and Jong Ho Hwang, 'Safeguarding the Future of Arbitration: Seoul Protocol Tackles the Risks of Videoconferencing', August 13, 2022 at: <http://arbitrationblog.kluwerarbitration.com/2020/04/06/safeguarding-the-future-of-arbitration-seoul-protocol-tackles-the-risks-of-videoconferencing/>

Arbitration Board clearly authorizes hearings and meetings to be held wherever the tribunal deems appropriate in terms of physical location.<sup>109</sup>

Not just for the questioning of witnesses or expert witnesses in oral hearings, but also to allow for the possibility of having distant hearings and videoconferencing, many arbitral institutions throughout the world will update or are most surely working on revising their arbitration rules.

It would be important to get a consensus from the parties in on-going arbitration matters that no party would attempt to overturn the arbitral award once it had been approved after the remote hearing. In that situation, sample procedural orders are available that can be utilized as a checklist and set of rules to address difficulties specific to remote video arbitration procedures by the arbitrators, parties, and counsel.<sup>110</sup> A similar clause will probably be considered adding at some point in the future by other significant institutions that are due for a rule update, including the institution that will be founded in Ethiopia.

According to Article 18/1/ of the new Arbitration and Conciliation Proclamation No. 1237/2021, it is clearly stipulated that the arbitration centre can be established by the government or the private sector. This also shows that according to the new law, it is possible to establish an arbitration centre in Ethiopia either by the government or by private parties. Therefore, government and private arbitration centres established in Ethiopia should be up-to-date as soon as possible.

Addis Ababa is the political capital of Africa and the main airport of Ethiopian Airlines. If this is the case, there will be no transportation problems for people coming from any country or direction. Therefore, we need a modern government and private arbitration centre to do this.

At present, it is a time when countries solve the problems that arise based on their trade relations, mainly based on arbitration agreements. Even a small country, Mauritius, is working to make it the centre of Asia and Africa by issuing a separate law. Accordingly, Ethiopia must build an efficient, independent economy based on the arbitration and reconciliation laws they have issued.

Also, when the problem of Covid-19 happened, it was a time when most people could not move, so in order to solve this problem, other countries passed a new law and allowed the arbitration process to be conducted by using video conference or other modern equipment that allows them to follow their cases from where they are. Ethiopia should also establish arbitration centres that have the capacity to implement arbitration award by incorporating a new method of dispute such as this in the centres that are being established now.

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<sup>109</sup>[http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT\\_MENU\\_CODE=MENU0008&TOP\\_MENU\\_CODE=MENU0007](http://www.kcabinternational.or.kr/common/index.do?jpath=/contents/sub020101&CURRENT_MENU_CODE=MENU0008&TOP_MENU_CODE=MENU0007).

<sup>110</sup> see Annex II 'Suggested Clauses for Cyber-Protocols and Procedural Orders Dealing with the Organisation of Virtual Hearings' in the ICC's Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic at: <https://iccwbo.org/content/uploads/sites/3/2020/04/guidance-note-possible-measures-mitigating-effects-covid-19-english.pdf>.

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

#### 4.1.CONCLUSION

1. The new law has many good things to enforce arbitration awards. However unlike other countries as per article 51/1/ of the conciliation and arbitration proclamation, arbitration awards given in Ethiopia or abroad are considered binding. There is a clear provision that if the case were to be heard by the court, it would be submitted to the court that can enforce the award, according to the law of CPC. This means that it will be executed in accordance with the existing civil procedure judgment enforcement provisions from 371 to 455. There is no other specific enforcement law. This approach will not meet the purpose of the proclamation in view of the current court proceedings and the fact that the procedure will be carried out according to the law of execution. Because the current process of court execution debate is very slow and time-consuming, and according to this system, it is difficult to say that the award given by the arbitrators will be carried out smoothly. Hence special procedural laws are needed to meet the purpose of speedy trial in the enforcement of arbitral awards.

2. Courts in Ethiopia legal system has a limited power to intervene in the arbitration decisions. Among those occasions subjecting arbitral awards to appeal and cassations can be cited as an example. Article 49(2) of the Proclamation allows parties to apply for cessation (highest instance of appeal) “where there is a fundamental or basic error of law”, but parties may waive the right of appeal. Therefore, the possibility of challenging final arbitral rulings through the appeals procedure still exists unless the parties may agree to forego judicial review for legal errors. In addition the court can intervene in arbitration process in order to enforce the interim measures rendered by an arbitral tribunal, taking evidence on request from the arbitral tribunal, the parties can enter to name or choose if they do not agree. Apart from this, the Ethiopian courts intervene in the arbitration process and keep the decision regarding the objection of the arbitrators suspended.

3. According to Article 51/1/ of proclamation a foreign arbitration award is considered binding and the case can be enforced in the court, but the court is governed by the current CPC. If this is the case, it means that it will be in accordance with the judgment execution provisions of the CPC of Ethiopia. In terms of timeline, there is no statutory timeline set. The timeline for recognition and enforcement procedure depends on the complexity of the matter. This creates delay and new law should be introduced to the country’s legal system.

4. The relevant government bodies and courts should implement in an appropriate manner. It is now very difficult in practice, especially regarding the foreign currency payment related to

the national bank. If the national bank does not pay attention to the issue of foreign exchange dollars, it will be difficult for Ethiopia to implement the NYC and the proclamation, as well as for the government and private arbitration centres established in Ethiopia.

**5.** Currently, countries have reached an agreement to enforce International Arbitration Award based on the NYC. Any disputes arising in international trade are resolved through arbitration. Because of this; Ethiopia ratified the NYC and enacted a new arbitration law. Therefore, Ethiopia will have the obligation to enforce foreign arbitration award or domestic award. So, it should have an organized arbitration centre and the award given should be enforced without delay. Additionally, the absence of a reliable arbitration institution in the nation is seen as a major obstacle. All of these things can be accomplished by domesticating ratified conventions and educating national judges on how to interpret and implement international award. It is also crucial to speak with attorneys knowledgeable in the state's arbitration award law where enforcement is sought. We must carefully construct the arbitration award and with the NYC in mind in order to ensure that an award is enforceable.

In Ethiopia, enforcement of foreign arbitral award has been subjected to strong preconditions making their enforcement challenging and tiresome. However, the recent ratification of the New York convention is assumed as one of the milestone acts for the future smooth recognition and enforcement of international commercial arbitration awards.

#### **4.2.Recommendations**

**1.** The researcher suggests that Ethiopia's government create new local arbitration institutions and assist those that already exist in order to successfully facilitate and promote commercial conflict settlement and arbitration awards. Additionally, promote outreach programs, public awareness campaigns, and, most critically, regular training for judges and attorneys so they can stay up with the dynamic nature of trade and business on an international market.

**2.** In the future, the regulations issued to implement the proclamation should include the basic points that were not mentioned in the proclamation. For example, to organize hearings to enforce foreign arbitration awards and to appoint judges who have assumed special bench, Also, since the judgment is to be enforced by the court, it should come out as a law that will allow it to have its own law or procedure that can be used to guide this dispute, or it should be issued as a law that gives authority to the federal supreme Court to issue a trial rule.

**3.** Adopting a system for doing research on fresh developments in business conflict resolution is also important. Stakeholders should be provided with seminars as a means of capacity building. Additionally, it is advised that the judiciary use all available resources to assist the high court commercial division, including training its staff, ensuring that all judges have access to arbitration training, and paying more attention to international arbitration in light of

the rise in foreign investments in our nation. By increasing knowledge of the importance of appropriateness and efficacy in determining disputes and resolving them through the use of alternative dispute resolution procedures, it is vital to strengthen the capacity of the judiciary and the general public.

**4.** If the arbitration award calls for payment to be made in foreign currency in accordance with the terms of the agreement, payments will not be issued to the winning firm because of the lack of foreign currency in Ethiopia. It is obvious that a law should be used to resolve this. But in actuality, the issue has not been resolved. As a result, in order to pay for foreign currency, a distribution system as well as a system for class- and level-based payments should be established, and a clear arbitration ruling that can effectively resolve the issue should be put into place.

**5.** The arbitration centres will provide as a venue for disputing parties who are unable to be present in person, according to Ethiopia's arbitration statute. They can debate through video conference or other modern means without having to show up in person; hence a procedural law should be passed to permit the calling of witnesses. Similar to this, more institutional support systems are needed for Ethiopia to implement the NYC in a meaningful way, and implementation may benefit from a multi-stakeholder platform. These changes must be implemented as soon as possible. This is because Ethiopia's financial industry is becoming more open to outside competition as Africa joins the Continental Free Trade Area. The key ingredients for maintaining the market economy and luring foreign direct investments are a solid arbitration background, ready institutions, and a competent judiciary.

**6.** Judges, as well as lawyers, have to become acquainted not only with the new proclamation, but also with the New York Convention, which diverts from the current practice. It is also important for Ethiopian practitioners to clearly understand the scope of application of the proclamation and, consequently, which provisions in the civil procedure code have become redundant as a result of the ratification. The attorney general is of course tasked with the duty to enhance the implementation of the New York Convention, but organs like the Bar Association, the Law School, and the Supreme Court could also be instrumental in facilitating this process.

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Republic of South Africa International Arbitration Act, 2017.

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### **III. Cases**

Hyten Eco corporate V Food Security Coordination of Ethiopian Ministry of Agriculture, No. 273810, federal high Court .

Daniel Birehane General contractor V Electric Power Corporation, No h/19/80/2005 the Addis Ababa chamber of commerce arbitration centre, AACCSA-AI.

Agrikome International company V Ethiopian Trading Businesses Corporation, No. 155880, The federal Supreme Court cassation bench.

BGP INC, CHINA NATIONAL PETROLEUM CORPORATION(MAINLAND CHINA) V (1) POLY-GCL PETROLEUM INVESTMENTS LIMITED ETHIOPIA BRANCH (2) POLY-GCL PETROLEUM INVESTMENTS LIMITED, No. 284097 Federal High court, Lideta bench.

### **IV. Interviews**

Interview with, Negus Teazazu Deputy Director General of Civil Affairs Administration, in Addis Ababa, head quarter building (Sep.15, 2022)

Interview with, Selam Setegn, Director of the arbitration institute of Ethiopian Chamber of Commerce and Sectoral Association. In the office of the director located in front of Federal police head quarter building, (Sep.4, 2022)

Interview with. Yohannes W/gebrel, Director of the Arbitration Institute of Addis Ababa Chamber of Commerce and Sectoral Association. in the office of the director located in front of Federal police head quarter building, (Sep.4, 2022)

Interview with, Michael Teshom, legal advocate and experienced Arbitration. legal advocate office of located in front of Federal High court building, (August 12, 2022)

Interview with, Liyu Tamru, who is an expert in international arbitration, in the office of located, “Lideta” (25 August 2022)

The interview made with highly experienced Federal High Court Judges of Lideta Civil Bench, judge Seble Kiefe, Judge Dawit Blaye, Judge Danieal Gerema, Judge Mesel Negus, and three other anonymous Judges), who is an expert in international arbitration, at Lideta Federal High Court Commercial bench Court Room (July – October,2022).